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December 1961

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VOLUME XXXIII DECEMBER 1961 NUMBER 1

CONTENTS

LEADING ARTICLES

THE NECESSITY OF UNITIZATION ..... *Raymond M. Myers* 1

THE COOPERATIVE IN OUR FREE ENTERPRISE SYSTEM ..... *John C. Satterfield* 14

STATE SOVEREIGNTY AND THE RATIFICATION OF THE CONSTITUTION—I ..... *William P. Murphy* 29

APPLICABILITY OF THE DEAD MAN STATUTE TO NEGLIGENCE ACTIONS IN MISSISSIPPI .... *Moran M. Pope, Jr.* 72

STUDENT COMMENTS

DESCRIPTIONS AND TAX TITLES 76

THE AD-LIB STATEMENT ON TELEVISION—LIBEL OR SLANDER 115

RECENT DECISIONS

Constitutional Law—Belief in Existence of God as a Test for Office 130

Constitutional Law—Communist Party Membership—Criminal Conviction Upheld 131

Constitutional Law—Evidence Obtained by Unreasonable Search and Seizure Not Admissible in State Courts 133

Constitutional Law—Federal Escheat Statute under the War Power 135

Constitutional Law—Justiciability 138

Constitutional Law — Sunday Laws — Upheld on Social Desirability 139

Constitutional Law—The Integrated Bar 141

Income Taxation — Nonrecognition of Gain on Sale of Old Residence—Deduction Limited 144

RECENT BOOKS

Briefing and Arguing Federal Appeals ..... *Elbert P. Tuttle* 147

The New Wage and Hour Law ..... *Dixon L. Pyles* 149

Books Received 151

Entered as second class matter, November 25, 1936, at the Post Office at University, Mississippi, and Baton Rouge, Louisiana, under the Act of Congress of March 3, 1879.
Published in December, March, May, and October

$4.00 Per Annum **$1.50 Per Current Number**

EDITORIAL AND BUSINESS OFFICE, UNIVERSITY, MISSISSIPPI

Mississippi Law Journal

JOURNAL of the MISSISSIPPI STATE BAR
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VOLUME XXXIII DECEMBER 1961 NUMBER 1

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Mississippi Law Journal

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THE NECESSITY OF UNITIZATION

*Raymond M. Myers**

I. INTRODUCTORY—RULE OF CAPTURE

In the beginning the production of oil and gas was unrestrained. Oil men carried on a chaotic business under what is known as the Law or Rule of Capture. This court-made law and the correlative offset law have been justly condemned as the creators of great physical and economic waste in the oil and gas industry, but they were clearly adopted by the courts in the absence of a better rule and as a rule of convenience.

During the formative period of the law the courts were ignorant of the nature of oil and gas, and in their search for an answer to the problem drew analogies to things with which they were familiar; thus, there developed the analogy to wild animals. Another explanation for the origin of the rule is the fact that there was then no way of ascertaining with any degree of accuracy from where the oil came. Consequently, the courts held that oil and gas belonged to the owner of the land so long as they were under it and subject to his control, but when they escaped to another's land and that owner possessed them, the former owner no longer had title.

If the owner of one tract may drill as many wells as he pleases at any point he desires on his tract, his neighbor, of course, has the same right. To paraphrase General Forrest each attempted "to git there fustest with the mostest" wells. Naturally, the owner uses this right either to gain an advantage or to protect his lease from drainage by drilling offset wells. In any event, we find an unrestricted race, the prize being the oil and gas under both tracts. The result is great physical waste of oil and gas, as well as the economic waste that flows from the drilling of unnecessary wells.

Much of the material in this article was taken from MYERS, THE LAW OF POOLING AND UNITIZATION (1957), and is reprinted here with the permission of Banks and Company, Inc., Albany, New York.

*Attorney at Law, Dallas, Texas.

II. Rule of Capture Restricted—Conservation Laws

A. Necessity and Legality of Conservation

The shameful waste of oil and gas and the price reductions resulting from unrestricted production under the law of capture threatened the ruin of the oil men and caused them to turn regretfully to the legislatures of the producing states for aid.

Oil and gas have been regarded as natural resources in every state where discovered, and their production, storing and transportation are affected with a public interest.[1] The public interest is based on the fact that these minerals are irreplaceable, that they are of immense benefit to individuals and industry, and that they constitute in many states an important source of revenue. Thus, each state where there is production, or where production is hoped for, has passed some laws looking to the conservation of oil and gas and the prevention of waste.

The authority of the states to pass such legislation rests in their police power.[2] Thus was the law of capture first restricted, and a sound legal basis for the prevention of waste was laid. Then came conservation laws that took the form of the proper spacing of wells, the establishment of drilling units, the determination of the reasonable market demand, the fixing of allowables, as well as the prevention of waste generally and specifically.

B. Well Spacing—Drilling Units

1. *Exceptions*

It was seen very early by the industry and by legislatures that the protection of correlative rights, orderly development, conservation, the avoidance of waste, and the drilling of unnecessary wells demanded as a minimum the proper spacing of wells and the establishment of drilling units.[3] The statutes and the rules pursuant thereto usually provide for the granting of exceptions after notice and hearing to prevent waste[4] and confiscation of property;[5] it is the abuse of this right and the fixing of drilling units on too small a spacing pattern that have resulted in the drilling of unnecessary wells. In the East Texas Field, where the well allowable is not affected by the amount of acreage in the tract upon which the well is drilled, approximately two-thirds of the wells have been drilled as exceptions to the established spacing pattern for the field, and the number increases each year. The average density of

[1] See, *e.g.*, Trapp v. Shell Oil Co., 145 Tex. 323, 198 S.W.2d 424 (1946).

[2] See Ohio Oil Co. v. Indiana, 177 U.S. 190 (1900).

[3] See Moses, *The Constitutional, Legislative and Judicial Growth of Oil and Gas Conservation Statutes*, 13 Miss. L. J. 353 (1941).

[4] *E.g.*, Railroad Comm'n v. Shell Oil Co., 139 Tex. 66, 161 S.W.2d 1022 (1942).

[5] *E.g.*, Corzelius v. Harrell, 143 Tex. 509, 186 S.W.2d 961 (1945).

wells in that field is below four acres, while the established spacing for the field is ten acres. Engineers agree that one well on each twenty acres would efficiently drain the field. The drilling of one well under an exception leads to the granting of others to prevent confiscation, resulting finally in the virtual abrogation of the rule.

2. *Allowable Problems—The Small Tract*

The regulatory authorities of many states, in conformity with the state statutes, fix the state allowable production. As the number of wells in a field increases the allowable per well must necessarily decrease, making it more and more difficult for them to pay out. Unquestionably, the operators have invested more money in some fields than they have been able to recover from production. If one well will efficiently drain an established drilling unit, then another one drilled on such unit is unnecessary since the additional well will not materially increase the production. Any well drilled upon a tract smaller than the established drilling unit may safely be regarded as unnecessary.

Situations, such as have arisen in the East Texas Field, have been partially remedied in other fields by giving greater weight to acreage in the allocation formulas, which is some states approach the ideal of giving an allowable commensurate with the amount of oil and gas in place beneath the tract upon which the well is located. But the problem of the tract smaller than the spacing or drilling unit continues to be a serious one[6] except where solved by statute.

3. *Solution: Compulsory Pooling*

The problem of the small tract is only one that pooling, both voluntary and compulsory, has helped to solve. With the passage of conservation statutes providing for compulsory pooling in twenty-two states, including Mississippi, nearly all of the producing states have gone as far as they can to prevent waste and protect the correlative rights of owners of small tracts. This legislation has been upheld both in federal and state courts wherever the question has arisen.

C. Market Demand Statutes

Reasonable market demand means the amount of oil reasonably needed for current consumption together with a reasonable amount for storage and working stock.[7] In Oklahoma, Texas, and many other states

---

[6]See Walker, *The Problem of the Small Tract Under Spacing Regulations*, 57 BAR ASS'N PROCEEDINGS 157 (1938); Hardwicke, *Oil Well Spacing Regulations and Protection of Property Rights in Texas*, 31 TEX. L. REV. 99 (1952).

[7]Railroad Comm'n v. Continental Oil Co., 157 S.W.2d 695 (Tex. Civ. App. 1941), *error refused for want of merit.*

the production of oil in excess of reasonable market demand is waste.

In 1932, the Supreme Court of the United States upheld Oklahoma's market demand statute in the *Champlin* case.[8] At that time the oil situation in Texas was chaotic due to the discovery of the great East Texas oil field and the lack of efficient enforcement. A million barrels of oil a day were being produced without effective regulation, and oil was bringing ten cents a barrel. The Texas legislature immediately passed a market demand statute and in a few months, due to this statute and to the upholding of the rules and regulations of the Commission,[9] oil production was restricted and the market was stabilized.

The market demand statute has been attacked as a scheme to keep prices high by making oil scarce. There is little foundation for this charge. As the statute is administered, the authorities in the producing states seem anxious to allow the production of all oil that the market will absorb. It has been held that the regulatory authorities have the right to consider that production in excess of reasonable market demand will create excessive storage above ground which results in loss from fire, evaporation, leakage, and other causes. The best and safest storage is nature's own. Regulatory authorities are also entitled to take into account the fact that when production is in excess of market demand, prices are apt to drop so low that marginal or small wells become unprofitable and must be abandoned leaving large quantities of oil in the ground never to be recovered.

III. Secondary Recovery and Pressure Maintenance

A. Methods

The chief aids to conservation and the increased production of oil and gas are secondary recovery and pressure maintenance operations. Engineers have long known that there are several natural sources of energy in oil and gas reservoirs which may be used in the production of oil and gas. They state that in most instances only about fifteen to twenty-five per cent of the oil in place is recovered by customary methods of primary production, that is, by natural flow and artificial lift. It is likewise generally conceded that this recovery percentage can be increased up to eighty per cent of the reservoir oil content by the use of secondary recovery or pressure maintenance operations which include pressure regulation, water flooding, cycling, in situ combustion and miscible displacement. Simply stated, the term "pressure main-

[8]Champlin Ref. Co. v. Corporate Comm'n, 286 U.S. 210 (1932).

[9]Amazon Petroleum Corp. v. Railroad Comm'n, 5 F. Supp. 633 (E.D. Tex. 1934); Walker, *The Interstate Compact and the Future of Market Demand Proration*, 75 Oil Weekly No. 12, p. 14; Hardwicke, *Legal Aspects of Limitation of Oil Production to Market Demand*, Oil and Gas Journal (Oct. 6, 1932).

tenance" refers to the injection of fluids early in the life of a field before the dissipation of pressures, while the term "secondary recovery" refers to operations conducted after the completion or near completion of primary operations.[10]

Water injection, the most common operation, is the controlled introduction of water into an oil producing stratum for the purpose of increasing the percentage and rate of recovery of oil from the stratum.[11] It recovers oil which would not be otherwise recoverable by primary production methods. Some form of water or gas injection may be begun with the initial production from a reservoir, though it is often used to obtain additional recovery through an increase in reservoir energy by the injection of liquids or gas into the reservoir after the original reservoir energy has been dissipated. Operators have found, however, that after the primary recovery period sometimes as much as eighty-five per cent of the oil was still in the reservoir. So, in addition to seeking new reserves by the drilling of wildcat wells, producers have found it to be to their advantage to seek to recover by secondary recovery methods this oil that has been left in the reservoir.

Water injection was first carried out in a haphazard fashion, but the engineers soon saw the need of a systematic pattern for location of input and producing wells. The five-spot pattern was evolved, consisting of four input wells at the corners of a square with a producing well in the center. This also was found, in many cases, to be an inefficient method of operation, though for legal and other reasons it was long found to be the best method available. With the advent of field-wide unitization, the engineers saw their opportunity to plan a water injection program for a field or common reservoir as a whole. To adhere to property lines in the development of a reservoir is to drill unnecessary input and producing wells and to produce oil with the maximum of waste and the minimum of efficiency.

Space does not permit even a description of other secondary recovery and pressure maintenance operations, but they may be listed as cycling, a gas injection method; in situ combustion, a recovery method which includes actually burning the sands containing oil of low gravity and high viscosity; and miscible displacement, another method of fluid injection. There are modifications of these operations.

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[10]Kingwood Oil Co. v. Bell, 204 F.2d 8 (7th Cir. 1953). See generally Kaveler, *The Engineering Basis for and the Results from the Unit Operation of Oil Pools*, 23 TUL. L. REV. 331 (1949); AMERICAN PETROLEUM INSTITUTE, SECONDARY RECOVERY OF OIL IN THE UNITED STATES, app. A, 255 (1942).

[11]Fancher, *The Development and Operation of Secondary Water Flooding Projects*, AMERICAN PETROLEUM INSTITUTE, SECONDARY RECOVERY OF OIL IN THE UNITED STATES, 48-60 (1942).

B. Results of these Operations

The classic example of the success of pressure maintenance by the injection of gas and water is the Shuler Field in Union County, Arkansas. This field was discovered in 1937 and unitized four years later. Had this field been unitized at the time of its discovery, or soon thereafter, the drilling of seventy-one wells would have been avoided. During the four years of primary operation, billions of cubic feet of rich gas were vented to the air. Prior to unitization, the field produced a total of approximately $16\frac{1}{2}$ million barrels of oil with a drop of reservoir pressure from 3,548 to 1,625, or a difference of 1,923 pounds. Thus, during those four years, fifty-five per cent of the vital reservoir pressure was expended in the production of eleven per cent of the total oil. During the first eight years of operation under unitization, thirty million barrels of additional oil were produced with a pressure drop of only 185 pounds. Under primary operation this field would have long since been exhausted, whereas by as late as 1954 it was producing well over 5,500 barrels per day. By January 1, 1953, it had produced over seventy-one million barrels of oil. The estimated recovery as a result of unit operation is approximately one hundred million barrels of oil, or more than one hundred per cent increase over competitive operations.

In the hearing before the Railroad Commission of Texas on a large Scurry County unit, the engineers testified that through unitized operations 795 million additional barrels of oil would be recovered that could not be recovered under primary operations. The phenomenal recovery of miscible displacement sometimes approaches one hundred per cent of the oil in place.

C. Legislation and Legality

That pressure maintenance and secondary recovery operations are conservation practices can no longer be questioned. It has been proved beyond doubt that, where adaptable, it increases the amount of recoverable oil in a formation. The legislatures of many of the oil producing states, in directly authorizing their administrative bodies to regulate pressure maintenance and secondary recovery methods, have specifically provided for the introduction of water, gas, air, and other substances into producing formations. Other states have statutes which, in general terms, would appear to confer this power upon their regulatory bodies.[12] Numerous orders have been issued under the authority of these statutes authorizing these operations, but it is noteworthy that very little litigation has arisen out of them.

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[12]In 5 SUMMERS, OIL AND GAS ch. 28 are listed the conservation laws of the United States and of various states, in many of which are set out references to secondary recovery and gas injection operations. *Cf.* SECTION OF MINERAL LAW, AMERICAN BAR ASS'N, CONSERVATION OF OIL AND GAS, A LEGAL HISTORY, 1948.

In the ordinary oil and gas lease there is an implied covenant of diligent operation. The lessee not only has the right to use any efficient method of producing oil but he may be required under the covenant "to employ such methods as are reasonably adapted to stimulate production."[13] Hence, it may be assumed that the right to use secondary recovery and pressure maintenance operations as efficient producing methods exists under the terms of the usual oil and gas lease whether or not any specific mention thereof is made in the lease. Secondary recovery has been construed to be a part of "operations on a lease."[14]

D. The Necessity of Unitization

While under some conditions a limited and efficient water flood program may be carried on without unitization, it is practically impossible to carry on any other form of secondary recovery or pressure maintenance operation without it. The input and production wells must be located in accordance with the best engineering practice and the field, being a unit by nature, must be operated as a whole. In the case of gas injection particularly, the location of an input well on one tract would displace gas on a neighboring tract and an off-set producing well would drain the gas with resulting damages and litigation.

The consolidation of oil and gas leases or other mineral interests in a field or common source of supply or a substantial portion thereof is generally referred to as "unitization," as distinguished from the word "pooling," which is applied to such interests covering comparatively small tracts.[15] Typical of the latter is the consolidation of separately owned mineral interests to form a drilling or proration unit.

IV. Voluntary Unitization

A. Difficulties and Delays

Unitization may be accomplished voluntarily by the execution on the part of interested operators and royalty owners of the unit agreements which cover an area fieldwide in scope. This is a prolonged and difficult matter, particularly where it is necessary to secure the signature of a large number of operators and royalty owners scattered over the United States and foreign countries, and some have failed accomplishment.

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[13]Merrill, Implied Covenants 192 (2d ed. 1940).

[14]Utilities Prod. Corp. v. Carter Oil Co., 72 F.2d 655 (10th Cir. 1934).

[15]See Whelan v. Manziel, 314 S.W.2d 126 (Tex. Civ. App. 1958), *writ of error refused*; See generally King, *Pooling and Unitization of Oil and Gas Leases*, 46 Mich. L. Rev. 311 (1948), and Myers, *Spacing, Pooling and Fieldwide Unitization*, 18 Miss. L. J. 267 (1947).

The purposes of the unit agreements are set out in the same, one of which reads as follows:

> This agreement is entered into to establish a pooled or unitized unit for said Seeligson Field necessary to effect pressure maintenance, secondary recovery and other fluid injection operations and to establish and operate co-operative facilities necessary for such operations.
>
> It is also the purpose of this agreement to establish such unit plan of development and operation to the end that the resources of said common field, pools, zones, or reservoirs may more properly be conserved and that underground and surface waste may be prevented and that the maximum recovery of oil, gas and other hydrocarbons from said oil and gas bearing reservoirs in said field may be achieved.
>
> And in order to afford to each of the parties to this agreement the right to recover his fair and equitable share of the production.

Delay in putting a unit into effect means a costly loss of revenue to the interest owners and is usually caused by a very small percentage of operators or royalty owners. Delay may be attributed to many causes arising out of the fact that the instruments are voluntary including some cases where interest holders hold out with the hope of obtaining an advantage.

B. Problems Arising from Non-Signers

1. *Background*

The voluntary unitization agreements would accomplish most of the excellent purposes set forth if all interest holders have signed, but this seldom happens, and failure to agree raises serious and vexatious problems. A lessee is without authority to unitize the royalty interest under the lease with other interests,[16] and in the absence of statutory authority unitization cannot be compelled.[17] Under these circumstances it is strictly up to the interest holders themselves as to whether or not they wish to execute the unit agreements.

The agreements usually provide that they may become effective when a prescribed percentage of interests have signed, but even when a sufficient number have complied there usually remains a small group that has not. These instruments are, of course, effective and enforceable as to those who have signed them, and preexisting oil and gas leases and other contracts are modified to the extent that the unit agreements are in conflict with them. But, when the signers begin the

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[16]See Knight v. Chicago Corp., 144 Tex. 98, 188 S.W.2d 564 (1945).

[17]See Dailey v. Railroad Comm'n, 133 S.W.2d 219 (Tex. Civ. App. 1939); See generally Western Gulf Oil Co. v. Superior Oil Co., 92 Cal. App.2d 299, 206 P.2d 944 (1949); Dodson v. Arkansas Oil & Gas Comm'n, 218 Ark. 160, 235 S.W.2d 33 (1950).

operation of the unit, thus created, they run into the problems caused by the existence of the unsigned interest, because the preexisting oil and gas leases and other contracts of the non-signers remain in effect and unmodified by the unit agreements.

2. *Decreased Efficiency*

As has been noted, the oil and gas reservoir is a unit by nature and to get the best results it should be operated as a unit, that is, as if it were one lease. In order to obtain the utmost efficiency in the operation of pressure maintenance or secondary operations it is important that the engineers be unrestricted in the location of injection or input wells and production wells, in the manner of their operation and in the transfer of allowables.[18] The efficiency of these operations decreases in inverse proportion to the number of unsigned tracts in the unit. An injection or input well is one through which water, gas, or air is injected into the producing horizon to be used as the motive power to sweep the oil and gas into the producing well. These wells are either drilled as such, or a producing well is converted into an input well. It is readily apparent that if an input well is placed on a small unsigned tract, its operation will result in driving oil and gas onto neighboring properties. It is also clear that the conversion of a producing well on an unsigned tract into an input well will not only have the effect last stated, but will also reduce the production from the tract by the amount that the well had been producing.

3. *Effect on Rights of Lessor and Lessee*

The properties of the non-signers cannot be used for the benefit of the unit. Thus, the facts recited raise serious questions of potential damages. It is beyond the scope of this article to discuss in detail the rights and obligations of lessors and lessees under the ordinary oil and gas lease, but it is sufficient to keep in mind in this connection that, while the unit may be in operation, these rights and obligations as to unsigned interests continue unaffected.[19]

It should, however, now be pointed out to the stubborn interest holder who is holding out that there are exceptions to the general rule that the stated and implied obligations of the non-unitized oil and gas lease remain unmodified. A lessor cannot refuse to enter a unitization agreement and expect to benefit therefrom.[20] Neither can he refuse to

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[18]See Brown v. Smith, 141 Tex. 425, 174 S.W.2d 43 (1943). For a full discussion, *cf.* MYERS, POOLING AND UNITIZATION ch. 2 (1957).

[19]See MYERS, POOLING AND UNITIZATION § 14.02 (1957).

[20]Dodson v. Arkansas Oil & Gas Comm'n, 218 Ark. 160, 235 S.W.2d 33 (1950).

enter a unitization agreement and at the same time collect damages for injury to his property as a result of the operation of his unit.[21]

4. *Payment of Royalty*

Another problem arises with reference to payments to non-signing operators and royalty owners. The position of these parties is dependent upon the existing oil and gas lease or other contracts to which he has previously assented. Thus, a lessee who has signed the unit agreement is bound in his relations with such royalty owners both by the terms of the oil and gas lease and by the terms of the unit agreement.[22] Under these circumstances the royalties must be accounted for in the manner provided in the oil and gas lease and on the basis of actual production from the tract,[23] rather than on the basis of the production allocated to the tract under the terms of the unit agreement. If there is no production from the tract in question, the unsigned royalty interest, in the absence of equitable considerations, receives nothing though there is production elsewhere in the unit.[24]

If all tracts in a unit are completely unitized, the production from all wells in the unit may be commingled in central storage tanks. The part due each tract in accordance with its percentage participation is delivered in kind to the working interest owner or owners of the tract, and it is out of this allocated production that the royalty owners under the tract are paid, based on the oil and gas lease or other contracts to which they are parties.

If, however, a tract is not completely unitized, the production from the wells on that tract must be run into separate tanks and must be separately measured and accounted for. This situation results in additional expense in time and money, both in bookkeeping and in the physical handling of the oil and gas.

Another problem arises from the fact that actual production from a tract and the production allocated thereto is never exactly the same and may vary considerably. The working interest owner of a tract who has signed the agreements receives only the allocated production. However, he must pay royalty to the non-signing royalty owner on the basis of actual production from the tract. The result is that the amount of royalty he paid may be more or less than the amount he would have paid on allocated production.

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[21]Tide Water Associated Oil Co. v. Scott, 159 F.2d 174 (5th Cir. 1946), *cert. denied* 331 U.S. 817 (1947).

[22]See Bruce v. Ohio Oil Co., 169 F.2d 709 (10th Cir. 1948), *cert. denied* 336 U.S. 913 (1949).

[23]See *Ibid.*

[24]Boggess v. Milam, 127 W. Va. 654, 34 S.E.2d 267 (1945).

5. *Transfer of Allowables*

Another problem arises with reference to transfer of allowables within the unit. One of the methods used in the operation of a unit to retard the decrease in pressure in a formation is the transfer of allowables from one well to another. These transfers are usually made from a well with a high gas-oil ratio to one with a lower ratio. The well from which the transfer is made is then shut in. In this manner the amount of gas produced is reduced, leaving the gas in the formation to assist in the maintenance of the pressure.

Transfer may also be permitted from poor wells, as, for instance, in the case of wells making an excessive amount of water or that for other reasons produce little oil or gas. Transfers may also be made from producing wells that have been converted into input wells.

If the owner of the working interest in a tract were unsigned, it would be very unlikely that he could obtain additional allowables by transfers because of the smallness of his tract, and for the further reason that if his tract is in the area to which transfers are being made it could generally be assumed that all his wells were good wells and no engineering advantage could be had by making transfers. This lessee would find himself in the hazardous position of being potentially liable for damages unless he could protect the tract from drainage in some way.

V. Compulsory Unitization

A. Solves Problems of Voluntary Unitization

These problems do not arise with reference to units created pursuant to compulsory unitization statutes. The consequences of voluntary unitization impair the efficiency of the operations, increase the expense, and reduce the recovery of oil and gas, affecting not only the operators, but the royalty owners and the public as well. Anything increasing the production of the operator inures to the benefit of the royalty owners holding under the tract from which the production comes, and where the production is decreased, the converse is also true. Restriction on the unbridled production of oil and gas is necessary in the public interest in preventing waste and as aids to conservation, and also for the protection of correlative rights. This restriction started as we have stated with well spacing and has come to its logical and ultimate conclusion in compulsory unitization.

B. The Small Interest Holder

The small interest holder is particularly in need of unitization, for without it he could not reap the financial benefits flowing from secondary recovery and pressure maintenance operations. He will also have the benefit of the wisdom and know-how of a group of oil men consti-

tuting the Operators Committee. Although the small interest holder's vote may be small, the unit agreements are usually fair and equitable and the regulatory authorities may be depended upon to protect him. In some states opposition to compulsory pooling and unitization is based on the fact that in the absence of such laws permission is granted to drill one well on a tract however small and that in such instances the well is allowed to drain large amounts of oil and gas from neighboring tracts.

C. The Necessity and Value of Compulsory Unitization

Prof. William O. Huie of the University of Texas Law School, recently said at the Regional Meeting of the American Bar Association at Houston:

> The traditional bases for justifying state regulation of production are (1) the protection of the public interest in the conservation of natural resources and (2) the protection of the private correlative rights of the landowners into whose land a common reservoir extends. The protection of private correlative rights had a dual aspect: (a) the protection of each landowner against waste by the others and (b) the protection of each landowner's right to a fair share of the production from the common reservoir, or to a reasonable opportunity to produce his fair share. The closest approach to perfection in achieving those objectives is by unit operation of an entire reservoir. It promotes maximum recovery at minimum cost by encouraging the use of the most effective production techniques, including pressure maintenance, and by discouraging the drilling of unnecessary wells. It also makes possible the distribution of the contents of the reservoir among the landowners in a manner that will most closely conform to the ideal of awarding each landowner the amount within the boundaries of his tract. Compulsory unit operation of a reservoir can therefore be sustained on the dual bases of preventing waste and protecting private correlative rights.

Fieldwide unitization, by making possible the most efficient pressure maintenance and secondary recovery operations, unquestionably prevents waste, protects correlative rights, prevents the drilling of unnecessary wells, increases the recovery of oil and gas, and generally is an economic boon to operators and royalty owners alike. A committee of the American Bar Association came to the following conclusions:

> It is only through unit operation that the logical and complete application of present technical knowledge of oil and gas conservation can be accomplished. It is only through unit operation of a common source of supply that individual property rights can be fully protected. It is only through unit operation that the maximum recovery can be achieved and the maximum rate of daily production maintained.

These achievements are so spectacular and important that compul-

sory unitization by a democratic procedure is, in the opinion of many, necessary and desirable.[25] Compulsory unitization is a controversial subject and much has been said in opposition, though a large part of the objection is based on a misuse of the instrumentality rather than on its intrinsic fault.[26]

D. The Spread of Compulsory Legislation

In actual practice the words "compulsory," "forced," and "required" are not as bad as they sound. For instance, under the compulsory law of Alabama and the new compulsory law of Louisiana and in other states, the voluntary agreement of 75 per cent in interest of lessees of record and royalty owners must be obtained before the plan of unitization can become effective. The figure is 63 per cent in Oklahoma. The number of individuals who have objected to actions taken by regulatory authorities acting under these laws has been relatively few. The lessees and the authorities appear anxious to obtain as far as possible prior voluntary agreements to the programs.

Compulsory unitization laws are gradually being adopted in the oil producing states. Recently such laws have been passed in Alabama, Louisiana, and Michigan, following similar laws in Oklahoma, Arkansas, Florida, Georgia, Nevada, Alaska, and Washington, and also several of the provinces in Canada. As Mr. Summers has said, "compulsory unit operation of oil and gas pools has become an accomplished legal fact."

VI. Summary and Conclusion

The history of the production of oil and gas has been traced from its unrestrained and wasteful beginning under the Law of Capture. Restraint began with laws preventing waste, including the limitation of production to the reasonable market demand and the fixing of allowables. There also followed the proper spacing of wells and the establishment of drilling units with only one well. These laws helped to protect the correlative rights of interest holders and tended to prevent the drilling of unnecessary wells, but the problem of the small tract was eventually solved only by compulsory pooling.

With the advent of pressure maintenance and secondary recovery operations on a fieldwide basis the need for laws to take full advantage of these invaluable operations arose. Voluntary unitization became a valuable instrument, but because of its costly delays and other weaknesses resulting largely from unsigned interests, the need of compulsory unitization has become apparent to the industry and to the legislatures of many states.

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[25]See Jacobs, *Unit Operation of Oil and Gas Fields*, 57 Yale L. Rev. 1207; see generally material cited in note 6 *supra*.

[26]See 1950 Okla. Bar J. 1793.

THE COOPERATIVE IN OUR FREE ENTERPRISE SYSTEM

*John C. Satterfield**†

I. Introduction

In the free enterprise economy which is ours in the United States of America today, the cooperative is a potent factor in retarding the rapid march of this country toward socialism and a government manipulated economy. It is both surprising and alarming to observe the criticism of cooperatives by businessmen and business organizations who are blinded to the service which is now being rendered by cooperatives to the free enterprise system. This service has been a material factor in support of capitalistic free enterprise in the United States for more than fifty years.

This article will be limited to farmer cooperatives, except insofar as a broad picture of the cooperative field in its widest sense is necessary to understand the basic principles and issues involved in the consideration of the place of cooperatives in the free enterprise system of today. A brief history of the development of cooperative effort will aid in recognizing that from the very first cooperatives have been an essential part of our economy.

II. Historical Outline

Although cooperative enterprise has been called "unique" in recent hearings before Congressional committees, the actual practice of cooperative enterprise by agricultural and industrial workers goes back for many centuries. This type of enterprise originated with the guilds of the Middle Ages, which were cooperative efforts of the early industrial employees to alleviate the conditions under which they worked.[1] Thereafter, cooperative enterprise continued on the Continent and in Great Britain in many forms until the birth of the modern cooperative business organization through the Rochdale Equitable Pioneer's Society in Rochdale, England, in 1844. Meanwhile, there was a parallel but entirely separate development of cooperative enterprise in America

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[1]See generally note, *Agricultural Cooperatives*, 27 Ind. L.J. 353 (1952).

dating back to the earliest colonial days.[2] Pioneers cooperated in clearing land, building homes, constructing roads. There were community husking bees, log rollings, threshing rings, beef and cheese rings, and many other cooperative activities. These were informal, but gradually definite organizations developed. As early as 1780 farmers organized societies to purchase purebred cattle and to make community drives of livestock to distant markets.

Gradually as the farmers' production expanded and the farmers' market increased and became more distant, cooperative techniques were developed both in the marketing of agricultural products and the purchase of supplies. Formal organizations developed, one of the first being the cooperative dairying at Goshen, Connecticut, about 1810. These gradually spread to the Midwest as illustrated by the organization of dairying cooperatives by Wisconsin farmers in 1841. During the next fifty years various types of cooperative enterprise spread throughout the entire United States, the principles of cooperative organization and operation gradually emerging by trial and error. Similar movements developed separately in Europe led by the Scandinavian countries. By 1860, cooperative organizations existed in most of the agricultural areas of this country, and in 1865 Michigan passed what is regarded as the first statute recognizing the cooperative method of selling farm products and purchasing farm supplies.

When we search for the first formal organization embodying the modern distinct cooperative features, we find that the modern cooperative probably had its origin in the group of twenty-eight weavers who banded together in Rochdale, England, in 1844, to overcome the desperate straits they were in as a result of a combination of high prices and low wages in their industry. It is said these weavers pooled about $140 as their initial capital and formed the first consumer cooperative. When the Rochdale weavers formed the Rochdale Equitable Pioneers' Society, they formulated seven basic principles of cooperative endeavor: open membership; democratic control on the principle of "one member—one vote;" limited interest on capital; trading on the basis of cash; patronage refunds; political and religious neutrality; and promotion of education.[3] It has long been recognized that all seven of the Rochdale principles need not be present for an organization to be properly considered a cooperative.

The National Grange, officially known as The Order of Patrons of Husbandry, was founded in 1867, and in 1874 the Grange sent one of its officers to Europe to study the cooperative enterprises which had developed there. By 1876 the National Grange had established more

[2]See generally U. S. DEP'T OF AGRICULTURE, FARMER'S COOPERATIVE SERVICE BULL. 1 (1955).

[3]See generally, HOLYOAKE, THE HISTORY OF THE ROCHDALE PIONEERS (1907).

than 20,000 local Granges and in twenty-six states local Granges practiced selling and buying for members on a cooperative basis.

The Federal Government and all of the states have repeatedly recognized the value of farmer cooperatives to the free enterprise economic system. Basic federal legislative recognition of the desirability of encouraging farmer cooperatives includes the exemption from federal income tax in 1913,[4] the protection of such cooperatives from the provisions of the Clayton Act in 1914,[5] the authorization of organization of cooperatives as against certain provisions of the anti-trust laws by the Capper-Volstead Act in 1922,[6] and the creation of the Federal Farm Board, predecessor to the Farm Credit Administration, in 1929.[7] Each of the fifty states has authorized the organization of cooperatives under special statutes, most of which contain features designed to encourage agricultural producers to form cooperatives.

Since the turn of the century the importance of farmer cooperatives to the agricultural economy of the United States has rapidly increased. The number of farmer cooperatives has increased from 3,099 in 1915 to the all-time high of 12,000 in 1930 with a gradual decline, following the reduction in the number of farms and farmers, to 9,731 in 1957-58, the latest year for which figures are available.[8] The number of memberships in farmer cooperatives has increased from 651,186 in 1915 to 7,485,779 in 1957-58.[9] In the year 1915 the business done by farmer cooperatives amounted to $310,313,000. During the 1957-58 season, the gross value of farm products marketed, farm supplies handled, and receipts for services performed by cooperatives amounted to approximately $14 billion, and the total net volume, after eliminating duplication resulting from interassociation business, amounted to almost $10.7 billion.

Although farmer cooperatives are of vital importance to the farmers of the United States, their effect upon the national business picture is often grossly exaggerated by critics. While directly comparative figures are not available, when the total net volume of farmer cooperative business for the crop season ending in 1958 which amounted to $10.7 billion is compared to the gross national product for the year 1958 which amounted to $450 billion, farmer cooperatives accounted for less than $2\frac{1}{2}$ per cent of the total business done.

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[4]Revenue Act of 1913, ch. 16, § II, 38 Stat. 172.

[5]38 Stat. 730 (1913), 15 U.S.C. § 12 (1946).

[6]42 Stat. 388 (1922), 7 U.S.C. § 291 (1946).

[7]46 Stat. 11 (1929), 12 U.S.C. § 1141 (a).

[8]U.S. DEP'T OF AGRICULTURE, NEWS FOR FARMER COOPERATIVES, Reprint 185 (1960).

[9]*Ibid.*

III. Cooperative Defined

Having considered the development of the cooperative movement from colonial times to date, the word cooperative should be defined, the various types of cooperatives differentiated, and the place of the farmer cooperative in our free capitalistic economy considered.

Throughout the years cooperatives have been variously defined.[10] Many federal and state statutes limit their application to organizations which meet the particular criteria set up in such statutes. These statutes have tended to complicate the definition of the term. It would seem that a simple and proper definition of a cooperative under the decisions of our courts is as follows: A cooperative is a legal entity organized and operated for the purpose of furnishing goods or services at cost to its patrons or to its patron-members (or patron-stockholders).

With reference to the type of legal entity utilized for the doing of business, cooperatives may be classified as follows: (1) cooperatives organized under special statutes enacted for that purpose; (2) cooperatives organized under general corporate laws which embody the above cooperative principle in their charter, bylaws, or patron contracts; (3) partnerships, unincorporated associations, or other recognized legal entities which embody the above cooperative principle in their articles or basic contracts and agreements.

IV. Cooperatives in the Free Enterprise System

In considering the place of cooperatives in our present economy, we must keep in mind use of the cooperative principle by many, varied types of businesses. With reference to the nature or type of services or goods furnished, cooperatives may be classified as follows:

1. Cooperatives organized for the purpose of providing financial aid to their members at cost, such as credit unions; mutual building and loan associations; health, accident, medical care and compensation companies; and mutual life insurance companies.

2. Cooperatives organized for the purpose of furnishing services at cost, such as the marketing and processing of agricultural products; the rendition of public utility functions such as electric, water and telephone service; and the rendition of various types of service to members, such as the services furnished to about one thousand newspapers by the Associated Press and to seventy-four railroads by the Railway Express Agency; services of trade associations and the like.

3. Cooperatives organized for the furnishing of goods at cost such

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[10]See Hulbert, *Legal Phases of Cooperative Associations*, 50 Farm Credit Administration Bull. 1 (1942), and Fetrow & Elsworth, *Agricultural Cooperation in the United States*, 54 Farm Credit Administration Bull. 4 (1947).

as manufacturing, purchasing and consumer cooperatives, and wholesale buying groups.

Under our constitutional form of government the inalienable rights of life, liberty and pursuit of happiness necessarily carry with them the rights of individuals to do business as they see fit within the framework of our federal and state constitutions and statutes. An individual, a partnership, an association, a conventional corporation, and a cooperative fit into our free enterprise system, one as well as the other. During thirty-one years of the practice of law, which has included meeting annually for many years with lawyers from every state in the union, I have never heard advanced any legal basis for criticism of persons who choose to do business in the form of a cooperative, whether organized under special state laws, under the general corporate law or in any other legally permissible form.

The position of the farmer cooperatives in our free enterprise was well stated by the National Association of Manufacturers as follows:

> A cooperative is a form of business enterprise that enables a group of individuals, partnerships, or corporations, to combine together for the purpose of producing or buying or selling a commodity or service. City consumers have gotten together to buy goods and sell them. Businessmen have formed mutual fire insurance companies. Individuals join together to buy life insurance through a mutual insurance company or merchandise through a mutual wholesale purchasing association. People who save money put their funds into a mutual savings bank. Farmers join together to buy goods they use in production or to sell the things they grow. All of these are cooperatives. They are also legitimate forms of private enterprise.[11]

Recent hearings before Congressional committees point up the fact that the cooperative movement is frequently and vehemently attacked by industrialists, wholesalers and retailers alike. These persons lose sight of the fact that the formation and operation of cooperatives represent the only logical manner in which the farmer can deal with the soaring costs of his operations as compared to the slight increase in his gross income over the years. The only other "solution" to this problem would draw the Federal Government into greater control of every element of farming operations until agriculture would constitute a wholly government-manipulated phase of our economic system. This "solution" is certainly not consistent with free enterprise.

V. Taxability and the Patronage Refund

When the attacks upon farmer cooperatives are analyzed, it is found in almost every instance that the actual reason motivating the

[11]National Association of Manufacturers, *NAM and Cooperatives* (privately published in New York), p. 7 (1946).

attacker is the competition which is given to the business of such person by cooperatives. These attacks are concentrated upon what the attackers believe to be the Achilles Heel of cooperatives—the payment of patronage refunds at the end of the fiscal year as a means of adjusting to actual cost the consideration received for goods or services furnished by the cooperative.

The so-called "tax advantage" which permits cooperatives to exclude patronage refunds from their income is available to every businessman in the United States. This has been well stated:

> The cooperative operation does not result in the formation of net income by the cooperative subject to tax. Should any firm elect to forego the making of income and operate according to cooperative principles on a cost-of-service basis, it likewise would have little or no net income subject to tax. Any business can enter into a contractual agreement with those that it serves to return to them savings resulting from their patronage and free itself from income tax on those amounts. In other words, our tax laws at the present time provide no general advantages to cooperatives that are not available to any other organization which elects to operate so as not to accumulate income.[12]

The criticism of the taxation of cooperatives must be considered in the light of the recognized principles of law applicable to the payment of patronage refunds and the exclusion thereof from the income of non-exempt cooperatives legally obligated to pay them.

A taxpayer is free to choose the type of organization or form in which he will cast his business activities to achieve a desired business or tax result. He is not required to adopt or continue with that form of organization which results in the maximum tax upon business income. When a legally enforceable obligation exists to refund to stockholder-patrons (sometimes referred to as member-patrons) the margin between the cost of the goods or services furnished and the amount received by the cooperative, it does not constitute income to the cooperative. Such margins properly calculated, allocated and paid to such patrons are excludable from the taxable income of the cooperative income as a matter of constitutional and legal right regardless of any statute or Treasury Regulation.

This exclusion is enforced by the courts on the grounds that (1) under the pre-existing legal obligations, the margins never become the property of the cooperative and are not a part of its income; (2) money received by one in a business transaction which he has no right to retain cannot be said to be a gain or a profit to him; (3) patronage refunds are distributions of money belonging to the patrons rather than distributions of income to the cooperative; (4) while held by

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[12]Knapp, *Are Cooperatives Good Business?*, Harv. Bus. Rev., Jan.-Feb. 1957, p. 59.

the cooperative the funds are in its hands as agent or trustee for its patrons to whom it is legally obligated to repay the same; and (5) patronage refunds are in reality discounts or rebates paid under a pre-existing legal obligation and are just as allowable as any other discount upon the purchase price of any commodity.

It is immaterial whether the cooperative is organized within a special cooperative statute or under the general corporation statutes; the test is the existence of a legally enforceable obligation to pay patronage refunds which existed during the period in which such refunds were earned. The obligation may be created by the charter, bylaws, or separate contract. If the board of directors of such a non-exempt cooperative has the discretion under the contract to utilize a limited portion of such margins for the payment of common stock dividends, the amount which may be thus diverted within the fixed limits will not be excluded. It is held that the legally enforceable obligation to pay patronage refunds is destroyed to the extent that such discretion to divert exists. Such a corporation is required to pay regular corporate income taxes upon net margins or profits derived from non-stockholder patrons when such persons are not entitled to patronage refunds upon their purchases.

The courts have repeatedly rejected the criticism of corporate forms and corporate contracts which minimize taxes. The burden of the argument is that cooperatives should be condemned because they choose to do business in a manner which prevents the patron's savings from becoming part of the corporate funds and corporate income so that such funds are not taxable to the corporation. This rule, announced repeatedly by the courts, was reiterated in *Friedlander Corp. v. Commissioner* in which the court held as follows:

> . . . . A taxpayer is free to choose the type of organization or form in which he will cast his business activities to achieve a desired business or tax result. He is not required to adopt or continue with that form of organization which results in the maximum tax upon business income. Meldrum & Fewsmith, Inc. 20 T.C. 790; Moline Properties, Inc. v. Commissioner, 319 U.S. 436 (63 S.Ct. 1132, 87 L.Ed. 1499). Furthermore, if a taxpayer actually carries on business in the form chosen, the tax collector may not deprive him of the incidental tax benefits flowing therefrom, unless it first be found to be a fiction or a sham. . . . Polak's Frutal Works, Inc., 21 T.C. 973.[13]

The basic fallacy of the argument against the exclusion of patronage refunds is stated as follows:

> Like other businesses, cooperatives have had varying prosperity. If successful, cooperatives may choose to distribute a part or all of their net income as patronage dividends

[13]Friedlander Corp. v. Commissioner, 216 F.2d 757 (5th Cir. 1954).

> rather than as stockholders' dividends. That is their right. But if this patronage distribution is from net income of the same economic nature as that on which their competitors are taxed where is the equity here? Tax treatment should be similar and business survival should not be determined by tax favoritism.[14]

The fact is that the profits of the conventional business corporation belong to the corporation and not to its individual stockholders, may be retained or distributed in the discretion of the directors and are properly a part of the corporation's taxable income. Exactly the opposite is true of the margins between the amount received by a cooperative from its patrons and the cost of goods or services furnished to its patrons or patron-stockholders. These margins belong to the patrons (or patron-stockholders), do not become the property of the cooperative and, as a matter of constitutional and legal right, cannot be taxed to the cooperative as a part of its income. They are of an entirely different nature from the profits of a conventional business corporation. As statements to this effect have been challenged in recent Congressional hearings and the country has been flooded by propaganda to the contrary, following are examples of court decisions which establish the fact beyond successful contradiction.

The most complete discussion of all of the various phases of the exclusion of patronage refunds by cooperatives and corporations in the nature of cooperatives by any court is found in *Farmers Cooperative Co. v. Birmingham*.[15] This case contains, in its thirty-seven pages, a more detailed discussion than found in any law journal article or any legal source other than a complete text. Several of the basic principles involved here are announced by that court as follows:

> In the case of Saenger v. Commissioner, 5 Cir 1934, 69 F.2d 613, 633, the United States Court of Appeals for the Fifth Circuit stated, "If compensation paid to one is paid to him as the agent or servant in fact, not in fiction, of another, that income is taxable, not to the servant or agent as earner, but to its real earner, the principal, (Cit.)." The Court cites in support of that statement cases dealing with community property or family partnership relations. The Mississippi Supreme Court in State v. Morgan Gin Co., 1939, 186 Miss. 66, 189 So. 817, used the theory advanced in the Saenger case to uphold a cooperative's exclusion of patronage dividends from its income subject to state income tax. Though no patronage dividends were involved, the United States Supreme Court in Commissioner of Internal Revenue v. Wilcox, 1946, 327 U.S. 404, 66 S.Ct. 546, 90 L.Ed. 752, 166 A.L.R. 884, stated that in order

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[14]See Stearns Magnetic Mfg. Co. v. Commissioner, 208 F.2d 849 (7th Cir. 1954).

[15]Guthman, *Tax Favoritism to Cooperatives*, Harv. Bus. Rev., Nov.-Dec. 1960, p. 119.

for receipts to constitute taxable income to a taxpayer there must be (1) the presence of claim or right to such receipts, and (2) the absence of a definite, unconditional obligation to pay the same to another. . . .

In Johnson v. Staple Cotton Cooperative Association, 1926, 142 Miss. 312, 107 So. 2, it was held that the cooperative marketing contract between the association and a member created the relation of principal and agent, the association being a sales agency operating for the benefit of the members. . . .

The exclusion of patronage dividends for federal income tax purposes has not been placed upon the ground that cooperatives are special creatures of statute under the tax laws, but is justified rather upon the theory that patronage dividends are in reality rebates on purchases or deferred payments on sale, allocated or distributed pursuant to a pre-existing obligation of the cooperative, and thus do not constitute taxable income to the cooperative. Cooperative Oil Assc. v. Commissioner, 9 Cir 1940, 115 F2d 666; Midland Cooperative Wholesale v. Commissioner, 1941, 44 B.T.A. 824.[16]

The tax court recently held as follows:

So construed, the agreement would meet the requirements for a nontaxable cooperative to the extent of member sales of cottonseed. Pomeroy Cooperative Grain Co., 31 T.C. 684 (Dec. 31, 1958) Dec. 23, 302. There was a pre-existing legal obligation; the members' cotton never became the property of the cooperative; and no non-member business accrued to the advantage of the members. And that the corporation was not organized as a cooperative is not fatal. Eugene Fruit Growers Association, supra; United Cooperatives, Inc., 4 T.C. 93 (Dec. 14, 145). The profits in question never belonged to petitioner and did not become a part of its income. Clover Farm Stores Corporation, 17 T.C. 1265 (Dec. 20, 977).[17]

A case decided by the Supreme Court of Mississippi in 1939 has been cited as authority by the tax court and several courts of appeal in connection with the exclusion of patronage refunds.

Money received by one in a business transaction which he has no right to retain, but, under the stipulations of the transaction, must return to the one from whom it was received could hardly be said to be a gain or profit to him. The word income is broad enough to include all that comes in, but its specific meaning must be determined by the intent of the party or parties employing it to be determined by the context, the subject being dealt with, and the character of the person or persons employing it. 31 C.J. 397. In taxing statutes, as usually construed, it "imports an actual gain; . . . indicates increase of wealth in hand." Bingham v. Long, 249 Mass. 79, 144 N.E. 77, 33 A.L.R. 809. When so interpreted it must here be held not to include things received by the taxpayer

[16]Farmers Cooperative Co. v. Birmingham, 86 F. Supp. 201 (N.D. Iowa 1949).
[17]Producers Gin, Inc., 18 CCH Tax Ct. Mem. 369 (1959).

in a business transaction which he has no right to retain, but must return to the one from whom it was received. When one received money in a business transaction which he has no right to retain but must return, his income from the business is neither increased nor diminished thereby; it remains as it would have been had he not received the money at all.[18]

In another instance the tax court said:

> This problem is not new, and has often been before the Courts. The accepted rule is that if the cooperative receives these earnings under an existing legal obligation to distribute them to its members, such earnings are not income of the cooperative and consequently are to be excluded in the computation of its gross income.[19]

Finally, the true nature of patronage refunds is clearly discussed in the case of *Uniform Printing & Supply Co. v. Commissioner,* which was decided in 1937.

> Had the taxpayer given a customer (whether stockholder or outsider) a discount promptly after filling the order, no one would call it a dividend. If a rebate were given promptly upon the customer's business reaching a certain volume, the same conclusion as to its character would follow. To make cost estimates and adjust them at or near the end of year returning the excess payment to the customer should not change the reasoning which leads to this conclusion. Nor should the fact that the customer is a stockholder materially affect the result.
>
> Perhaps a single refund coming at the end of each year would lessen the irresistibility of the inferences, but the conclusion would still fit the facts better than one founded on a dividend assumption. It is true the taxpayer is not a nonprofit corporation in a legal sense. It is subject to a tax upon the profit by it made. Nevertheless, net profits in its case must depend upon the facts. Payment to the customers, who are also taxpayers, of sums called refunds based upon the volume of business transacted and in no way dependent upon stock ownership, is the determinative factor.
>
> Considering all the facts we conclude that the payments in issue were made as refunds rather than as dividends to stockholding customers.[20]

Tax advantage in favor of cooperatives has been greatly overemphasized. Every individual proprietor, every partnership, every corporation in the United States may enter into patronage contracts under which patronage refunds (or delayed discounts) are deductible or excludable from taxable income of the business. In spite of this, there are still those who contend that because there is "double taxation" of common stock dividends, there should be "double taxation" of patron-

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[18]State v. Morgan Gin Co., 186 Miss. 66, 189 So. 817 (1939).

[19]Colony Farms Cooperative Dairy, Inc., 17 T.C. 688 (1951).

[20]Uniform Printing & Supply Co. v. Commissioner, 88 F.2d 75 (7th Cir. 1937).

age refunds. It is basic to say that two wrongs do not make a right. Simply because there is "double taxation" of one is no argument for "double taxation" of the other.

It appears that the attacks made upon the exclusion of patronage refunds from cooperative taxable income are actually a "tempest in a teapot." The reason is simply that, if Congress should enact and the courts should uphold a statute preventing the exclusion of true patronage refunds from the income of cooperatives, all cooperatives would simply proceed to do business at cost by reduction of the original price charged for their services or goods. This is, of course, an over-simplification for the resulting inconveniences and difficulties in obtaining sufficient working capital, in obtaining funds for capital reserves and in the use of assessments or compulsory capital contributions are recognized. For most cooperatives, these difficulties would not be insurmountable. In fact, many cooperatives, particularly those which furnish services, those of an industrial nature, and those dealing with commodities where the prices do not fluctuate rapidly, would need only to cease their policy of "following the market" and actually sell goods or render services at or about cost. Frequently, the results would be far more objectionable to competitors than the exclusion of patronage refunds.

VI. The Cooperative in the Form of a General Business Corporation

Turning to some of the problems within the cooperative field, a basic difficulty of cooperatives has been that of attracting capital to finance organization and operations. One of the manifestations of the cooperative movement that may well appear in increasing proportions during the coming years is the cooperative set up in the form of a general business corporation. In many instances this type of cooperative is much preferable to the ones set up according to the state statutes for the establishment of cooperatives. As we approach this new era of the cooperative's place in the free enterprise system, it would be well for us to give careful consideration to the cooperative in the nature of a general business corporation and its importance to the cooperative movement.

Great flexibility is provided by the use of the general corporate form in organizing a cooperative. There are states in which the general corporate organization has never been used for the formation of a cooperative. Nevertheless, there seems to be no legal reason why the general corporate form could not be utilized for the organization and operation of a cooperative in any state in the union.

Harking back to the Rochdale principles of 1844, one of these was that of "one member—one vote." This has been followed in most of the special statutes authorizing the organization of cooperatives,

although it is sometimes varied to permit limited multiple voting, or voting power related to amount of patronage as to some or all corporate matters. Some of the federal and state statutes providing special benefits to cooperatives embody the "one member—one vote" principle as one of the tests of statutory qualification. Nevertheless, this is not one of the tests set up by the courts in determining the cooperative nature of a business. This element has proved to be one of the inhibiting factors in the attraction of substantial investments to provide working capital and other proper reserves.

Laying aside historical significance and theory, consideration of the hard facts of present day financing and business reveal the following advantages arising from the flexibility of the use of general corporation laws for the organization of cooperatives:

1. Under the general corporate form, the cooperative would not have the status of an exempt cooperative under the federal income tax law. Nevertheless, its charter and bylaws may carry a legally enforceable obligation to handle its business at cost and to refund to its patron stockholders the difference between the amount received and the actual cost of doing business. This will entitle the corporation to exclude from its gross income all patronage refunds paid or payable under the rules similar to those applicable to cooperatives organized as non-exempt cooperatives under special state statutes. However, under the general corporate form there is no maximum upon the amount of fixed dividends which may be payable upon the different forms of stock. On the other hand, as is true of all entities of a cooperative nature which are not exempt cooperatives, the dividends upon capital stock may be paid only with tax paid money and hence should be held to as low a percentage as possible. Nevertheless, it may be necessary to provide for a higher percentage of return in the form of dividends in order to obtain working capital.

2. The use of this form results in the ability to authorize the issuance of all forms of corporate stock permissible under the general statutes. This may include preferred stock of all kinds, with limited dividends cumulative or noncumulative as desired. Dividends may be limited to any percentage of par value which may be desired, with or without a callable feature. Such preferred stock may have no voting power (under most state statutes) or may have voting power equal to that of the common stock. Payment of dividends may be given preference over the payment of patronage refunds in order to make the investment more attractive.

3. The extent of the participation in the management of the corporation by various classifications of stockholders may be varied. This is sometimes material in maintaining compliance with special definitions contained in federal or state statutes. As an illustration,

common voting stock may be divided into classes such as Class A common stock with a par value of $5 per share (20 votes for each $100 invested), Class B common stock with a par value of $100 per share (one vote for each $100 invested) and Class C common stock with a par value of ten cents per share (1000 votes for each $100 invested). Again we are dealing with the hard facts of modern business as distinguished from the theory of "democratic control, one member—one vote."

4. Under this form of organization different classes of common stock may perform different functions in the allocation to its stockholders of the services or goods furnished to the corporation. The charter or bylaws may provide preferred patronage rights with each class of stock whereby each is permitted to purchase a named quantity of the products of the corporation or a fixed amount measured by the market price thereof. Thus, the extent of a stockholder's right to receive goods or services furnished by the corporation would be proportionate to his investment in stock. This also may be varied as to particular products. For instance, if a manufacturing cooperative manufactures anhydrous ammonia, ammonium nitrate, and mixed fertilizer, it may have three classes of stock. Class A stock would carry with it preferred patronage rights for the purchase of anhydrous ammonia only. Class B stock would carry with it preferred patronage rights for the purchase of ammonium nitrate only. Class C stock would carry with it preferred patronage rights for the purchase of mixed fertilizer only. Thus, in one corporate organization the stockholder may in effect invest in the different manufacturing enterprises carried on by such corporation.

5. In addition to the issuance of varied forms of capital stock, the cooperative organized under general corporate statute may issue bonds or certificates of indebtedness with any preferential features desired, with or without security, but, of course, subject to federal and state regulation when sold on an interstate basis and subject to state regulation when sold on an interstate basis. These certificates of indebtedness bonds are unlimited as to form and content as are similar obligations of general corporations formed under general laws. Under proper charter or bylaw provisions, payment of such certificates or bonds may be given preference over payment of patronage refunds in cash.

6. In addition to ordinary certificates of indebtedness, charter or bylaws may authorize the issuance of what are sometimes called "certificates of participation." These are actually certificates of indebtedness carrying with them preferred patronage rights to purchase fixed amounts of the products of the corporation. They differ from stock in every particular that certificates of indebtedness differ therefrom, the interest payable upon the certificates of participation are deductible as a part of the cost of doing business, and yet the certificates may carry with

them preferred patronage rights to the same extent as stock. This means that holders of certificates of participation will have no vote in the business of the company but will be patrons on the same basis as stockholders, will have preferred patronage rights, and will receive patronage refunds at the end of the fiscal accounting period. This carries with it the advantage to the investor of an agreed contractual payment of interest, with all the rights of stock ownership except voting, and carries the advantage to the corporation that the return in the form of interest paid upon these certificates is deductible as a cost of doing business.

7. Another illustration of the flexibility of the use of the general corporate form is that the preferred stock, the certificates of participation, and certificates of indebtedness may be callable or not, as provided in charter or bylaws or as provided in the trust indenture under which the certificates are issued.

8. Another flexible feature of the use of the general corporate form is the ability of the corporation to enter into contracts with non-members or non-stockholders whereby such persons will receive patronage refunds. There is no requirement that the corporation pay patronage refunds to non-stockholder patrons on the same basis as stock-holder patrons, nor is there any requirement that non-stockholder patrons be treated with complete uniformity. The freedom of contract inherent in general corporate entities is present.

9. By the use of general corporate form the charter or bylaws may contain restrictions upon the purchase or transfer of stock. In most states it may be provided that stock may be transferred to or held only by agricultural producers or some other class of persons. The provisions setting up preferred patronage rights may also restrict the use of such rights in such a way as to prevent the effective transfer of the stock contrary to the policy of the company. For instance, it may be provided that all preferred patronage rights will cease when the stockholder ceases to be an actual agricultural producer or that the preferred patronage rights will be no greater than the amount of the production of the company actually used by the stockholder on his own property. Through these means the agricultural integrity of the corporation may be preserved, for, if the common stock dividend rate is low, the major advantage of ownership is the use of the right to purchase the products or services of the corporation through the preferred patronage rights.

10. Under the general corporate form the original corporation in its charter may permit the organization of any number or type of subsidiaries. These may be wholly or partially owned and controlled by the parent corporation. They may be used as adjuncts to the business of the parent corporation or for any entirely separate purpose.

There are a number of disadvantages to the general corporate

form which are readily discernible and which should be taken into consideration prior to making the determination to set up a cooperative in the form of a general business corporation. These include, of course, the fact that the entity is subject to all of the regulatory statutes affecting general corporations such as Blue Sky laws, the federal security acts, the anti-trust laws without limitation, and certain relatively small corporate taxes from which cooperatives in some states are exempt, such as franchise taxes, privilege taxes, fees paid in connection with compliance with Blue Sky laws, and others.

STATE SOVEREIGNTY AND THE RATIFICATION OF THE CONSTITUTION—I†

*William P. Murphy**

INTRODUCTION

Immediately after the signing of the Constitution on September 17, 1787, the Convention resolved that "the preceding Constitution be laid before the United States in Congress assembled, and that it is the opinion of the Convention, that it should afterwards be submitted to a convention of delegates, chosen in each state by the people thereof, under the recommendation of its legislature, for their assent and ratification; and that each convention assenting to, and ratifying the same, should give notice thereof to the United States in Congress assembled."[1] Then there followed a recommended procedure for establishing and inaugurating the operation of the new government.

Along with the Constitution went a transmittal letter from Washington as the president of the Convention, which significantly emphasized the transcendence of national over local interests. "The friends of our country have long seen and desired, that the power of making war, peace and treaties, that of levying money and regulating commerce, and the corresponding executive and judicial authorities should be fully and effectually vested in the general government of the Union. . . . It is obviously impracticable in the federal government of these states, to secure all rights of independent sovereignty to each, and yet provide for the interest and safety of all. . . . It is at all times difficult to draw with precision the line between those rights which must be surrendered, and those which may be reserved; and on the present occasion this difficulty was increased by a difference among the several states as to their situation, extent, habits, and particular interests. . . . In all our deliberations on this subject we kept steadily in our view, that which appears to us the greatest interest of every true American, the consolidation of our Union, in which is involved our prosperity, felicity, safety, perhaps our national existence. . . ."[2]

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†This article continues a study which began with *State Sovereignty Prior to the Constitution*, 29 Miss. L. J. 115 (1958); continued with *State Sovereignty and the Founding Fathers*, 30 Miss. L. J. 135 (1959); 30 Miss. L. J. 261 (1959); and 31 Miss. L. J. 50 (1959); and continued with *State Sovereignty and the Drafting of the Constitution*, 31 Miss. L. J. 203 (1960); 32 Miss. L. J. 1 (1960); 32 Miss. L. J. 155 (1961); and 32 Miss. L. J. 227 (1961).

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[1] 2 Farrand, The Record of the Federal Convention 665 (rev. ed. 1937).

[2] *Id.* at 666-67.

Congress, which was sitting in New York at the time, received the Constitution, the Convention resolution, and the transmittal letter on September 20. Although, as put by Bancroft, Congress was being invited by these documents "to light its own funeral pyre," a clear majority in Congress was in favor of submitting the Constitution to the states for popular decision. This majority would have liked the submission to be unanimous and to carry with it the recommendation and approval of Congress. There was, however, a strong opposition organized under the leadership of Richard Henry Lee, Nathan Dane of Massachusetts, and Melanchton Smith of New York. This group first argued that Congress had no power under the Articles to accede to the Convention's recommendation. Failing in this, they sought then to attach amendments to the Constitution before it went forth to the people. It soon became obvious that the opposition could not prevent the submission but could prevent its being unanimous. Their price for unanimous submission was that Congress should use no words which would constitute a stamp of approval of the Constitution. Under this compromise, therefore, Congress on September 28 unanimously resolved "that the said report with the resolutions and letter accompanying the same be transmitted to the several legislatures in order to be submitted to a convention of delegates chosen in each state by the people thereof in conformity to the resolves of the Convention made and provided in that case."[3]

In the meantime, the Constitution had been reprinted in all the leading journals and newspapers of the states, with the result that supporters and opponents were already forming into recognizable and cohesive groups, which quickly became known as Federalists and Anti-Federalists. Actually, as we have seen, the term "federal" had prior to this time been used as a word of art to designate the confederation type government of the Articles, whereas the government created by the Constitution was denominated in the Convention a "national" one. According to this previously accepted meaning, the opponents of the Constitution were the true federalists, its supporters were nationalists. The politically sagacious supporters of the Constitution realized that to campaign for the Constitution as "Nationalists" would arouse the fears of the people. They therefore shrewdly pre-empted for themselves the label Federalists, thus placating popular opinion and leaving to the opponents of the Constitution the negative style of Anti-Federalists. By and large, the Federalists were composed of those conservative city merchant and tidewater planter groups who since independence had been seeking a stronger central government. Similarly, with some notable exceptions, the Anti-Federalists were made up of the old radical ele-

[3]DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN States 1007 (Tansill ed. 1927).

ments, the back country farmers and the town artisans and mechanics who were state and local minded in their view of government.

For the next year debate and discussion over the Constitution was the principal topic of interest throughout the states. In public meetings and private conversation, in letters to the newspapers, in essays and pamphlets, by every means of communication available the merits and demerits of the Constitution were analyzed and explicated. In several of the state conventions the struggle over ratification was bitter and hard fought and the victory of the Constitution a narrow one. During the course of the ratification campaigns, dozens of objections were levied against the Constitution, but it seems fair to say that most of these were comprehended under two general headings—that the Constitution would destroy the sovereignty of the states, and that the Constitution had no bill of rights as a protection of personal freedom. The purpose of this article is to examine a representative sampling of the contemporary literature and also the debates in the state conventions, where recorded, for the purpose of ascertaining the understanding of the people of America as to the effect the Constitution would have upon the sovereignty of the states.[4]

LITERATURE OPPOSING THE CONSTITUTION

Letters of a Federal Farmer.

Richard Henry Lee had represented Virginia in the Continental Congress and had moved the resolutions which had led to the Declaration of Independence and the Articles of Confederation. He served also in the Confederation Congress, and had been appointed a member of the Philadelphia Convention but had declined to serve. Although an aristocrat, he was sympathetic with democratic causes; he was a long-time political ally of Patrick Henry. As noted, he opposed the Constitution in Congress on its referral by the Convention, and continued his opposition throughout the ratification campaign. His *Letters of a Federal Farmer* were perhaps the ablest of the anti-federal writings. The first series of these letters, from which the following discussion is taken, were published in October, 1787, and were widely reprinted and circulated throughout the states.

Lee stated at the outset that on a careful examination of the plan of government proposed by the Convention, "It appears to be a plan retaining some federal features; but to be the first important step, and to aim strongly at one consolidated government of the United States."[5] Admitting the inadequacy of the Articles, he said that "Our object has

[4]This literature will be cited in footnotes in this article and succeeding installments of this study.

[5]Lee, *Letters of a Federal Farmer*, in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 279 (Ford ed. 1888).

been all along to reform our federal system, and to strengthen our governments—to establish peace, order and justice in the community—but a new object now presents. The plan of government now proposed is evidently calculated totally to change, in time, our condition as a people. Instead of being thirteen republics, under a federal head, it is clearly designed to make us one consolidated government."[6]

To Lee it was clear that the Constitution was the culmination of a carefully planned program on the part of nationalists. "This consolidation of the states has been the object of several men in this country for some time past. . . . To have a just idea of the government before us, and to show that a consolidated one is the object in view, it is necessary not only to examine the plan, but also its history, and the politics of its particular friends."[7] Referring to the confederation, "We find, therefore, members of Congress urging alterations in the federal system almost as soon as it was adopted."[8] Adverting to the enactment by state legislatures of tender, suspension, and paper money laws, Lee said that "By these and other causes, several orders of men in the community have been prepared, by degrees, for a change of government; and this very abuse of power in the legislatures, which in some cases has been charged upon the democratic part of the community, has furnished aristocratical men with those very weapons, and those very means, with which, in great measure, they are rapidly effecting their favorite object."[9]

Lee then elaborated upon the unfolding of the plot. ". . . when by the evils, on the one hand, and by the secret instigations of artful men, on the other, the minds of men were become sufficiently uneasy, a bold step was taken. . . . A general convention for mere commercial purposes was moved for—the authors of this measure saw that the people's attention was turned solely to the amendment of the federal system; and that, had the idea of a total change been started, probably no state would have appointed members to the convention. The idea of destroying ultimately, the state governments, and forming one consolidated system, could not have been admitted—a convention, therefore, merely for vesting in Congress power to regulate trade was proposed . . . September, 1786, a few men from the middle states met at Annapolis, and hastily proposed a convention to be held in May, 1787, for the purpose, generally, of amending the confederation . . . still not a word about destroying the old constitution and making a new one—the states still unsuspecting, and not aware that they were passing the Rubicon, appointed members to the new convention, for the sole and express purpose of revising and amending the Confederation—and

[6] *Id.* at 282.
[7] *Id.* at 283.
[8] *Ibid.*
[9] *Ibid.*

probably not one man in ten thousand in the United States, till within these ten or twelve days, had an idea that the old ship was to be destroyed, and he put to the alternative of embarking in the new ship presented, or of being left in danger of sinking—the states, I believe, universally supposed the convention would report alterations in the confederation, which would pass an examination in Congress, and after being agreed to there, would be confirmed by all the legislatures, or be rejected. . . . Here the favourite moment for changing the government was evidently discerned by a few men, who seized it with address."[10] With some self-reproach, Lee lamented the failure of "many good republican characters" to attend the Convention. "The non-attendance of eight or nine men, who were appointed member of the convention, I shall ever consider as a very unfortunate event to the United States. Had they attended, I am pretty clear that the result of the Convention would not have had that strong tendency to aristrocracy now discernible in every part of the plan. There would not have been so great an accumulation of power, especially as to the internal police of this country in a few hands as the constitution reported proposes to vest in them—the young visionary men, and the consolidating aristocracy, would have been more restrained than they have been."[11]

As Lee read the Constitution, it was clear to him that the potential was there for eventually accomplishing such a degree of centralized power and law as to virtually reduce the states to political ciphers. "The powers lodged in the general government, if exercised by it, must intimately effect the internal police of the states, as well as external concerns. . . ."[12] ". . . [A]s to powers, the general government will possess all essential ones, at least on paper, and those of the states a mere shadow of power. And therefore, unless the people shall make some great exertions to restore to the state governments their powers in matters of internal police; as the powers to lay and collect, exclusively, internal taxes, to govern the militia, and to hold the decisions of their own judicial courts upon their own laws final, the balance cannot possibly continue long; but the state governments must be annihilated, or continue to exist for no purpose."[13]

Lee said that it was necessary "to examine the extent, and the possible operations of some of those extensive powers proposed to be vested in this government. These powers, legislative, executive, and judicial, respect internal as well as external objects. Those respecting external objects, as all foreign concerns, commerce, imposts, all causes arising on the seas, peace and war, and Indian affairs, can be lodged nowhere else, with any propriety, but in this government. Many powers

[10] *Id.* at 284.
[11] *Id.* at 285.
[12] *Id.* at 293.
[13] *Id.* at 292.

that respect internal objects ought clearly to be lodged in it; as those to regulate trade between the states, weights and measures, the coin or current monies, post offices, naturalization, etc. These powers may be exercised without essentially effecting the internal police of the respective states. But powers to lay and collect internal taxes, to form the militia, to make bankrupt laws, and to decide on appeal, questions arising on the internal laws of the respective states, are of a very serious nature, and carry with them almost all other powers. These taken in connection with the others, and powers to raise armies and build navies, proposed to be lodged in this government, appear to me to comprehend all the essential powers in this community, and those which will be left to the states will be of no great importance."[14]

Lee also called attention to the latitudinal nature of the "necessary and proper" clause. "It is proper the national laws should be supreme, and superior to state or district laws; but then the national laws ought to yield to unalienable or fundamental rights—and national laws, made by a few men, should extend only to a few national objects. This will not be the case with the laws of Congress. To have any proper idea of their extent, we must carefully examine the legislative, executive and judicial powers proposed to be lodged in the general government, and consider them in connection with a general clause in Article I, Section 8, in these words. . . ."[15] then quoting the "necessary and proper" clause. "The powers of this government, as has been observed, extend to internal as well as external objects, and to those objects to which all others are subordinate; it is almost impossible to have a just conception of their powers, or of the extent and number of the laws which may be deemed necessary and proper to carry them into effect, till we shall come to exercise those powers and make the laws."[16] And when that time came, Lee said there was a presumption "that men who govern will in doubtful cases construe laws and constitutions most favorably for increasing their own powers."[17]

Adverting to the supremacy clause, Lee gave this solemn warning: "It is to be observed that when the people shall adopt the proposed Constitution it will be their last and supreme act; it will be adopted not by the people of New Hampshire, Massachusetts, etc., but by the people of the United States; and wherever this constitution, or any part of it, shall be incompatible with the ancient customs, rights, the laws or the constitutions heretofore established in the United States, it will entirely abolish them and do them away. And not only this, but the laws of the United States which shall be made in pursuance of the federal constitution will be also supreme laws, and wherever

[14] *Id.* at 300-01.
[15] *Id.* at 312.
[16] *Ibid.*
[17] *Id.* at 313.

they shall be incompatible with those customs, rights, laws or constitutions heretofore established, they will also entirely abolish them and do them away. By the article before recited, treaties also made under the authority of the United States shall be the supreme law. It is not said that these treaties shall be made in pursuance of the constitution—nor are there any constitutional bounds set to those who shall make them. The president and two-thirds of the senate will be empowered to make treaties indefinitely, and when these treaties shall be made, they will also abolish all laws and state constitutions incompatible with them."[18]

The Letters of Agrippa.

These letters, eighteen in number, appeared in the *Massachusetts Gazette* between November 1787 and February 1788. They were the most effective anti-federal writings which appeared in that state, and were attributed at the time of their publication to James Winthrop. One of the letters states that the speculation concerning the identity of the writer is "conjectural," but Winthrop himself did not deny their authorship. They are, in any event, consistent with his views, for his opposition to the Constitution defeated his election from Cambridge as a delegate to the Massachusetts convention.

The best kind of government for America, thought Agrippa, was "a *Federal Republic.* By this kind of government each state reserves to itself the right of making and altering its laws for internal regulation, and the right of executing those laws without any external restraint, while the general concerns of the empire are committed to an assembly of delegates, each accountable to his own constituents. This is the happy form under which we live. . . ."[19] "We are now, in the strictest sense of the terms, a federal republic. Each part has within its own limits the sovereignty over its citizens, while some of the general concerns are committed to Congress."[20] The only deficiencies Agrippa could discover in the old plan could have been cured by two new articles—"By one a limited revenue would be given to Congress with a right to collect it, and by the other a limited right to regulate our intercourse with foreign nations."[21]

The Constitution, on the other hand, was something different. "To anybody who will be at the trouble to read the new system, it is evidently in the same situation as the state constitutions now possess. It is a compact among the *people* for the purposes of government, and not a compact between states. It begins in the name of the people, and

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[18] *Id.* at 311-12.

[19] *The Letters of Agrippa* (anon.), in ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 93 (Ford ed. 1892).

[20] *Id.* at 77.

[21] *Id.* at 80.

not of the states."[22] Furthermore, "It is evident . . . that the new constitution proposes to delegate greater powers than are granted to our own government. . . ."[23] "In the proposed constitution . . . more numerous and extensive powers are given them [*i.e.* Congress] than to any state legislature upon the continent."[24] So limitless, in fact, were the powers of Congress that "the direct tendency of the proposed system is to consolidate the whole empire into one mass and, like the tyrant's bed, to reduce all to one standard."[25]

Throughout his letters Agrippa continually sought to demonstrate "that the proposed constitution is an actual consolidation of the separate states into one extensive commonwealth."[26] In the fourth letter he wrote: "Yet there is, I believe, not one point of legislation that is not surrendered in the proposed plan. Questions of every kind respecting property are determinable in a continental court, and so are all kinds of criminal causes. The continental legislature has, therefore, a right to make rules in all cases by which their judicial courts shall proceed and decide causes. No rights are reserved to the citizens. The laws of Congress are in all cases to be the supreme law of the land, and paramount to the constitutions of the individual states. The Congress may institute what modes of trial they please, and no plea drawn from the constitution of any state can avail. The new system is, therefore, a consolidation of all the states into one large mass, however diverse the parts may be of which it is to be composed."[27]

In the fifth letter Agrippa says that "The idea of consolidation is further kept up in the right given to regulate trade. Though this power under certain limitations would be a proper one for the department of Congress, it is in this system carried much too far, and much farther than is necessary."[28] Again on this point in the thirteenth letter, "By section 8 of article I, Congress are to have the unlimited right to regulate commerce, external and *internal*. . . . They have also the unlimited right to imposts and all kinds of taxes, as well to levy as to collect them. They have indeed very nearly the same powers claimed formerly by the British parliament."[29]

In the tenth letter: "By article 3, section 2, Congress are empowered to appoint courts with authority to try civil causes of every kind, and even offenses against particular states. By the last clause of Article I, section 8, which defines their legislative powers, they are authorized

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[22] *Id.* at 112.
[23] *Id.* at 113.
[24] *Id.* at 107.
[25] *Id.* at 66.
[26] *Id.* at 69.
[27] *Id.* at 64-65.
[28] *Id.* at 70.
[29] *Id.* at 97.

to make laws for carrying into execution all the 'powers vested by this constitution in the government of the United States, or in *any department* or officer thereof;' and by article VI, the judges in every state are to be bound by the laws of Congress. It is therefore a complete consolidation of all the states into one, however diverse the parts of it may be."[30]

Again from the thirteenth, amplifying the foregoing point: "In Article III, section 2, it is declared, that 'the judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made or which shall be made under their authority.' Among the cases arising under this new constitution are reckoned, 'all controversies between citizens of different states,' which include all kinds of civil causes between those parties. The giving Congress a power to appoint courts for such a purpose is as much, there being no stipulation to the contrary, giving them power to legislate for such causes, as giving them a right to raise an army is giving them a right to direct the operations of the army when raised. But it is not left to implication. The last clause of Article I, section 8, expressly gives them power"[31] and here Agrippa quoted the "necessary and proper" clause. "It is, therefore, as plain as words can make it, that they have a right by this proposed form to legislate for all kinds of causes respecting property between citizens of different states. That this power extends to all cases between citizens of the same state, is evident from the sixth article, which declares all continental laws and treaties to be the *supreme law* of the land, and that all state judges are bound thereby, *'anything in the constitution or laws of any state to the contrary notwithstanding.'* If this is not binding the judges of the separate states in their own office, by continental rules, it is perfect nonsense. There is then a complete consolidation of the legislative powers in all cases respecting property. . . . These are necessary parts of the new system, and it will never be complete till they are reduced to practice. They effectually prove a consolidation of all the states. . . ."[32] "I do not say that it is intended that all these changes should take place within one year, but they probably will in the course of half a dozen years, if this system is adopted."[33] Once the system was adopted, ". . . in every doubtful case it is an established rule to decide in favor of authority."[34] And Agrippa closed his letters with this final warning: "It is to be remembered too, that if you are so far charmed with eloquence, and misled by fair representation and charitable constructions, as to adopt

[30] *Id.* at 83.
[31] *Id.* at 96.
[32] *Id.* at 96-97.
[33] *Id.* at 68.
[34] *Id.* at 95.

an undefined system, there will be no saying afterwards that you were mistaken, and wish to correct it. *It will then be the constitution of our country, and entitled to defense.*"[35]

The Letters of Cato.

These letters, seven in number, were written by George Clinton and appeared in the *New York Journal* between September 1787 and January 1788. Clinton was elected governor of New York seven times and served consecutively from 1777 to 1795. Due to the commercial advantages accruing to New York because of its strategic geographic situation, Clinton had opposed the grant of national revenue and commercial powers to Congress during the Confederation and likewise opposed the Constitution. In addition, he had built a powerful political machine as governor, and his defense of state sovereignty was based in part at least upon his fear of playing a reduced role in a new national system. The Letters of Cato ended abruptly and it is probable that additional letters were contemplated but unwritten due to the convening of the New York Assembly and Clinton's preoccupation with political duties.

Cato first gave "a short history of the rise and progress of the Convention, and the conduct of Congress thereon. The states in Congress suggested that the articles of confederation had provided for making alterations in the confederation—that there were defects therein, and as a means to remedy which, a Convention of delegates, appointed by the different states, was resolved expedient to be held for the sole and express purpose of revising it, and reporting to Congress and the different legislatures such alterations and provisions therein as should (when agreed to in Congress and confirmed by the several states) render the federal constitution adequate to the exigencies of government. . . . For the sole and express purpose aforesaid a Convention of delegates is formed at Philadelphia. What have they done? Have they revised the Confederation, and has Congress agreed to their report? Neither is the fact. This Convention have exceeded their authority given to them, and have transmitted to Congress a new political fabric, essentially and fundamentally distinct and different from it, in which the different states do not retain separately their sovereignty and independence, united by a confederate league—but one entire sovereignty, a consolidation of them into one government—in which new provisions and powers are not made and vested in Congress, but in an assembly, senate and president, who are not known in the articles of confederation. . . . This new government, therefore," Cato concluded, was

[35] *Id.* at 121-22.

"founded in usurpation. . . ."[36] According to Cato, "The recital, or premises on which the new form of government is erected, declares a consolidation or union of all the thirteen parts, or states, into one great whole, under the firm of the United States, for all the various and important purposes therein set forth."[37]

Cato emphasized the indefinite nature of the powers granted to the new national government. After noting that "the language of the article relative to the establishment of the executive of this new government was vague and inexplicit,"[38] he added that "here I cannot help remarking that inexplicitness seems to pervade this whole political fabric,"[39] and asked his readers "whence is it therefore that you are about to precipitate yourselves into a sea of uncertainty, and adopt a system so vague, and which has discarded so many of your valuable rights?"[40] He stated that "Hitherto we have tied up our rulers in the exercise of their duties by positive restrictions; if the cord has been drawn too tight, loosen it to the necessary extent, but do not entirely unbind them. I am no enemy to placing a reasonable confidence in them, but such an unbounded one as the advocates and framers of this new system advise you to, would be dangerous to your liberties; it has been the ruin of other governments, and will be yours, if you adopt with all its latitudinal power."[41]

Address to the People of the State of New York, by a Plebeian.

This address was written sometime in early 1788 by Melancthon Smith, a prominent and influential merchant and lawyer. Smith was a member of the Continental Congress from New York during 1785-1788 and was a political ally of Governor Clinton. He opposed the Constitution as a member of the New York Convention until the news arrived of Virginia's ratification, at which time he broke the anti-federal ranks and announced his support.

"Previous to the meeting of the convention," Smith wrote, "the subject of a new form of government had been little thought of, and scarcely written upon at all. It is true, it was the general opinion, that some alterations were requisite in the federal system. This subject had been contemplated by almost every thinking man in the union. It had been the subject of many well-written essays, and it was the anxious wish of every true friend to America. But it was never in the contemplation of one in a thousand of those who had reflected on the

[36]Clinton, *The Letters of Cato*, in ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 252-54 (Ford ed. 1892).

[37]*Id.* at 255-56.

[38]*Id.* at 265.

[39]*Ibid.*

[40]*Id.* at 266-67.

[41]*Id.* at 277.

matter, to have an entire change in the nature of our federal government—to alter it from a confederation of states, to that of one entire government, which will swallow up that of the individual states. I will venture to say that the idea of a government similar to the one proposed, never entered the minds of the legislatures who appointed the convention, and of but very few of the members who composed it, until they had assembled and heard it proposed in that body; much less had the people any conception of such a plan until after it was promulgated. When it was agitated, the debates of the Convention were kept an impenetrable secret, and no opportunities were given for well informed men to offer their sentiments upon the subject."[42]

Smith then undertook to "show that in the leading and most important objections that have been made to the plan, there has been and is an entire concurrence of opinion among writers and in public bodies throughout the United States."[43] The very first one of these objections which the writer set forth was as follows: "It has been objected to that the new system, that it is calculated to, and will effect such a consolidation of the states, as to supplant and overturn the state governments. In this the minority of Pennsylvania, the opposition in Massachusetts, and all the writers of any ability or note in Philadelphia, New York, and Boston concur. It may be added that this appears to have been the opinion of the Massachusetts convention, and gave rise to that article in the amendments proposed, which confines the general government to the exercise only of powers expressly given."[44]

Smith then listed some of the other objections which had been made to the Constitution. "The constitution has been opposed because it gives to the legislature an unlimited power of taxation both with respect to direct and indirect taxes. . . . The opposers of the constitution have said that it is dangerous because the judicial power may extend to many cases which ought to be reserved to the decision of the state courts. . . . The power of the general legislature to alter and regulate the time, place and manner of holding elections, has been stated as an argument against the adoption of the system . . . the little degree of responsibility under which the great officers of government will be held, and the liberty granted by the system to establish and maintain a standing army without any limitation or restrictions, are also objected to the constitution. . . ."[45]

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[42]M. Smith, *Address to the People of the State of New York, by a Plebian, op. cit. supra* note 5, at 100-01.

[43]*Id.* at 102.

[44]*Ibid.*

[45]*Id.* at 102-03.

The Writings of Luther Martin.

On November 29, 1787, Martin delivered to the Maryland legislature a report of the proceedings of the Constitutional Convention. Thereafter the speech was revised, considerably amplified and reprinted as a pamphlet under the title *Genuine Information*, which was circulated throughout the states by anti-federalists.

There were in the Convention, Martin said, "three parties of very different sentiments and views. One party, whose object and wish it was to abolish and annihilate all state governments, and to bring forward one general government over this extensive continent. Those who openly avowed this sentiment were, it is true, but few; yet it is equally true that there was a considerable number, who did not openly avow it, who were . . . in reality favorers of that sentiment; and acting upon those principles, covertly endeavoring to carry into effect what they well knew openly and avowedly could not be accomplished. The second party was not for the abolition of the state governments . . . but they wished to establish such a system as could give their own states undue power and influence in the government over the other states. A third party was what I considered truly federal and republican. . . . This party were for proceeding upon terms of federal equality; they were for taking our present federal system as the basis of their proceedings. . . ."[46] What happened in the Convention which made a document like the Constitution possible was that "those who wished the total abolition of state governments, well knowing that a government founded on truly federal principles, the basis of which were the thirteen state governments preserved in full force and energy, would be destructive of their views; and knowing they were too weak in numbers openly to bring forward their system; conscious also that the people of America would reject it if proposed to them,—joined their interests with that party who wished a system giving particular states the power and influence over the others, procuring in return mutual sacrifices from them, in giving the government great and undefined powers as to its legislative and executive; well knowing that, by departing from a federal system, they paved the way for their favorite object, the destruction of the state governments. . . ."[47]

Martin said that he and other members of the third party had urged in the Convention "that the government we were forming was not in reality a federal, but a national government, not founded on the principles of the preservation, but the abolition or consolidation of all state governments; . . . that we had not been sent to form a government over the inhabitants of America, considered as individuals; that as individuals, they were all subject to their respective state govern-

[46] 3 FARRAND, *op. cit. supra* note 1, at 179.
[47] *Id.* at 180.

ments . . . that the system of government we were entrusted to prepare was a government over these thirteen states; but that, in our proceedings, we adopted principles which would be right and proper only on the supposition that there were no state governments at all, but that all the inhabitants of this extensive continent were, in their individual capacity, without government, and in a state of nature."[48] Martin noted that the Constitution "is, in its very introduction, declared to be a compact between the people of the United States, as individuals; and it is to be ratified by the people at large, in their capacity as individuals; all of which, it was said, would be quite right and proper if there were no state governments, if all the people of this continent were in a state of nature, and we were forming one national government for them as individuals."[49]

Martin said he and his party had urged "that the principles on which a federal government over states ought to be constructed and ratified, are the reverse; that instead of the legislature consisting of two branches, one branch was sufficient . . . that the representation, instead of being drawn from the people at large, as individuals, ought to be drawn from the states as states, in their sovereign capacity; that, in a federal government, the parties to the compact are not the people, as individuals, but the states, as states; and that it is by the states as states, in their sovereign capacity, that the system of government ought to be ratified, and not by the people, as individuals."[50] They had opposed the Constitution, therefore, because they viewed it "as a national, not a federal government, as calculated and designed not to protect and preserve, but to abolish and annihilate the state government."[51]

As a matter of fact, Martin wrote, "so far were the friends of the system from pretending that they meant it, or considered it as a federal system, that on the question being proposed 'that a union of the states, merely federal, ought to be the sole object of the exercise of the powers vested in the convention,' it was negatived by a majority of the members, and it was resolved 'that a national government ought to be formed.' Afterwards the word 'national' was struck out by them, because they thought the word might tend to alarm; and although now they who advocate the system pretend to call themselves federalists, in convention the distinction was quite the reverse; those who opposed the system were there considered and styled the federal party, those who advocated it, the anti-federal."[52]

"In the whole system," Martin wrote, "there was but one federal feature—the appointment of the senators by the states in their sovereign

[48] *Id.* at 192.
[49] *Id.* at 193.
[50] *Ibid.*
[51] *Id.* at 195.
[52] *Ibid.*

capacity, that is, by their legislatures, and the equality of suffrage in that branch; but it was said, that this feature was only federal in appearance. To prove this, and that the Senate as constituted could not be a security for the protection and preservation of the state governments, and that the senators could not be justly considered the representatives of the states, as states,"[53] Martin called attention to their fixed term of office, their payment of compensation out of the national treasury, and the lack of any power of recall by their state, all of which made them unanswerable to the state as they would be in a truly federal system. The conclusion was that "for six years the senators are rendered totally and absolutely independent of their states, of whom they ought to be the representatives, without any bond or tie between them. During that time, they may join in measures ruinous and destructive to their states, even such as should totally annihilate their state governments, and their states cannot recall them, nor exercise any control over them."[54]

Martin then singled out certain powers of Congress for specific analysis and criticism. Of Congress's power to control the time, place and manner of elections, he said it was "a provision expressly looking forward to, and, I have no doubt designed for, the utter extinction and abolition of all state governments; nor will this, I believe, be doubted by any person, when I inform you that some of the warm advocates and patrons of the system, in convention, strenuously opposed the choice of the senators by the state legislatures, insisting that the state governments ought not to be introduced in any manner, so as to be component parts of, or instruments for carrying into execution, the general government."[55]

Of Congress's power to lay and collect taxes, he said that "under the pretense of securing the collection of these duties, and to prevent the laws which imposed them from being evaded, the Congress may bring the decision of all questions relating to the conveyance, disposition, and rights of property, and every question relating to contracts between man and man, into the courts of the general government. . . ."[56] He said he had proposed in the Convention that this power of direct taxation of individuals should not be operative unless a state were delinquent in remitting its quota of revenue to the national treasury, but "the proposition was rejected by a majority, consistently with their aim and desire of increasing the power of the general government, as far as possible, and destroying the powers and influence of the states."[57]

Of Congress's power to create tribunals inferior to the Supreme Court, he asserted: "That to have inferior courts appointed under the

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[53] *Id.* at 193.
[54] *Id.* at 194.
[55] *Id.* at 195.
[56] *Id.* at 204.
[57] *Id.* at 205.

authority of Congress in the different states, would eventually absorb and swallow up the state judiciaries, by drawing all business from them to the courts of the general government, which the extensive and undefined powers, legislative and judicial, of which it is possessed, would easily enable it to do. . . ."[58]

And Congress's power over the militia he referred to as "this extraordinary provision, by which the militia, the only defense and protection which the state can have for the security of their rights against arbitrary encroachments of the general government, is taken entirely out of the power of their respective states, and placed under the power of Congress. . . ."[59] He said objections to the provision in the Convention had "procured from some of the members an open avowal of those reasons by which we believed before that they were actuated. They said that, as the states would be opposed to the general government, and at enmity with it, which, as I have already observed, they assumed as a principle, if the militia was under the control and the authority of the respective states, it would enable them to thwart and oppose the general government. They said, the states ought to be at the mercy of the general government, and therefore the militia ought to be put under its power, and not suffered to remain under the power of the respective states."[60]

Martin also discussed the provision relating to treason. "The time may come when it shall be the duty of a state, in order to preserve itself from the oppression of the general government, to have recourse to the sword; in which case, the proposed form of government declares that the state and every of its citizens who act under its authority are guilty of a direct act of treason; reducing, by this provision, the different states to this alternative, that they must tamely and passively yield to despotism, or their citizens must oppose it at the hazard of the halter if unsuccessful; and reducing the citizens of the state which shall take arms, to a situation in which they must be exposed to punishment, let them act as they will; since, if they obey the authority of their state governments, they will be guilty of treason against the United States; if they join the general government, they will be guilty of treason against their own state."[61] Martin said that in order "To save the citizens of the respective states from this disagreeable dilemma, and to secure them from being punishable as traitors to the United States, when acting expressly in obedience to the authority of their own state," he had introduced an amendment to the section which would have provided "that no act or acts done by one or more of the states against the United States, or by any citizen of any one of the

[58] *Id.* at 206.
[59] *Id.* at 208.
[60] *Id.* at 208-09.
[61] *Id.* at 223.

United States, under the authority of one or more of the said states, shall be deemed treason, or punished as such; but, in case of war being levied by one or more of the states against the United States, the conduct of each party towards the other, and their adherents respectively, shall be regulated by the laws of war and of nations."[62] This provision, however, "was not adopted, being too much opposed to the great object of many of the leading members of the convention, which was, by all means to leave the states at the mercy of the general government, since they could not succeed in their immediate and entire abolition."[63]

In addition to the *Genuine Information*, Martin wrote a series of letters to the *Maryland Journal* which were published January through March 1788. These letters started out as a reply to Oliver Ellsworth's *Letters of a Landholder* but developed into a more general attack on the Constitution.

In one of these letters Martin explained his purpose in introducing what became the supremacy clause of the Constitution and how it was transformed by the Convention. "To place the matter in a proper point of view, it will be necessary to state, that as the propositions were reported by the committee of the whole house, a power was given to the general government to negative the laws passed by the state legislatures, a power which I considered as totally inadmissible; in substitution of this I proposed the following clause, which you will find very materially different from the clause adopted by the Constitution. . . ."[64] Here Martin set forth the clause as he introduced it, and as quoted in a previous article. "When this clause was introduced, it was not established that inferior continental courts should be appointed for trial of all questions arising on treaties and on the laws of the general government, and it was my wish and hope that every question of that kind would have been determined in the first instance in the courts of the respective states; had this been the case . . . if such treaties or laws were inconsistent with our constitution and bill of rights, the judiciaries of this state would be bound to reject the first and abide by the last, since in the form I introduced the clause, nothwithstanding treaties and the laws of the general government were intended to be superior to the laws of our state government, where they should be opposed to each other, yet that they were not proposed nor meant to be superior to our constitution and bill of rights. It was afterwards altered and amended (if it can be called an amendment) to the form in which it stands in the system now published, and as inferior continental, and not state courts, are originally to decide on those ques-

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[62] *Ibid.*

[63] *Ibid.*

[64] Martin, *Letters to the Maryland Journal, op. cit. supra* note 19, at 360.

tions, it is now worse than useless, for being so altered as to render the treaties and laws made under the general government superior to our constitution, if the system is adopted it will amount to a total and unconditional surrender to that government, by the citizens of this state, of every right and privilege secured to them by our constitution, and an express compact and stipulation with the general government that it may, at its discretion, make laws in direct violation of those rights."[65]

Referring to "some of the principal framers of the Constitution," Martin said that "I most sacredly believe their object is the total abolition and destruction of all state governments, and the erection on their ruins of one great and extensive empire. . . ."[66] He described the Constitution in the following language: ". . . a system which is an innovation in government of the most extraordinary kind; a system neither wholly federal, nor wholly national—but a strange hotch-potch of both—just so much federal in appearance as to give its advocates in some measure, an opportunity of passing it as such upon the unsuspecting multitude, before they had time and opportunity to examine it, and yet so predominantly national as to put it in the power of its movers, whenever the machine shall be set agoing, to strike out every part that has the appearance of being federal, and to render it wholly and entirely a national government."[67]

Martin used a striking analogy to illustrate his point. "The conduct of the advocates and framers of this system toward the thirteen states, in pretending that it was designed for their advantage, and gradually obtaining power after power to the general government, which could not but end in their slavery, he compared to the conduct of a number of jockeys who had thirteen young colts to break; they begin with the appearance of kindness, giving them a lock of hay, or a handful of oats, and stroking them while they eat, until being rendered sufficiently gentle they suffer a halter to be put round their necks; obtaining a further degree of their confidence, the jockeys slip a curb bridle on their heads and the bit into their mouths, after which the saddle follows of course, and well booted and spurred, with good whips in their hands, they mount and ride them at their pleasure, and although they may kick and flounce a little at first, not being able to get rid of their riders, they soon become as tame and as passive as their masters could wish them."[68]

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[65] *Id.* at 361.

[66] *Id.* at 366.

[67] *Id.* at 267-68.

[68] *Id.* at 342.

LITERATURE SUPPORTING THE CONSTITUTION

Letters of a Landholder.

Written by Oliver Ellsworth, these thirteen letters were published simultaneously in the *Connecticut Courant* at Hartford and the *American Mercury* at Litchfield. They appeared between November 1787 and March 1788, and were reprinted and circulated widely throughout the northern and middle states. Much of the material in the letters consisted of attacks on Gerry and Martin, both of whom, as has been noted, made replies.

The Landholder addressed his appeal for approval of the Constitution to other landholders, declaring that "Every foreign prohibition on American trade is aimed in the most deadly manner against the holders and tillers of the land, and they are the men made poor. Your only remedy is such a national government as will make the country respectable; such a supreme government as can boldly meet the supremacy of proud and self-interested nations. The regulation of trade ever was and ever will be a national matter. A single state in the American union cannot direct much less control it. This must be a work of the whole, and requires all the wisdom and force of the continent. . . ."[69] At the present time, he said, "Like thirteen contentious neighbors we devour and take every advantage of each other, and are without that system of policy which gives safety and strength, and constitutes a national structure. Once we were dependent only on Great Britain, now we are dependent on every petty state in the world and on every custom house officer of foreign ports. If the injured apply for redress to the assemblies of the several states, it is in vain, for they are not, and cannot be known abroad. If they apply to Congress, it is also vain, for however wise and good that body may be, they have not power to vindicate either themselves or their subjects."[70] Landholder warned that "This is the last opportunity you may have to adopt a government which gives all protection to personal liberty, and at the same time promises fair to afford you all the advantages of a sovereign empire."[71] He asserted that "A government capable of controlling the whole, and bringing its force to a point, is one of the prerequisites for national liberty."[72]

Replying to Gerry's charge that some of the powers of Congress were ambiguous, and others indefinite and dangerous, Landholder stated: "The charge of being ambiguous and indefinite may be brought against every human composition, and necessarily arises from the imperfection of language. Perhaps no two men will express the same sentiment in

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[69] Ellsworth, *Letters of a Landholder*, *id.* at 140-41.

[70] *Id.* at 142-43.

[71] *Id.* at 145.

[72] *Id.* at 147.

the same manner, and by the same words; neither do they connect precisely the same ideas with the same words. From hence arises an ambiguity in all language, with which the most perspicuous and precise writers are in a degree chargeable."[73] Actually, he said, "It is an excellency of this Constitution that it is expressed with brevity, and in the plain, common language of mankind. Had it swelled into the magnitude of a volume . . . had it been expressed in the scientific language of the law . . . had the powers given to the legislature been loaded with provisos, and such qualifications as a lawyer who is so cunning as even to suspect himself would probably have intermingled," in such event, Landholder said, "the people who are to be its judges would have neither patience nor opportunity to understand it," "to the great body of the people" it would have been "altogether obscure," and "there would have been much more of a deception in the case."[74]

Replying to the charge that the powers granted to the national government were excessive, Landholder asserted that "It would not be difficult to show that every power given to the legislature is necessary for national defense and justice, and to protect the rights of the people who create this authority for their own advantage. . . .[75] Their courts are not to intermeddle with your internal policy, and will have cognizance only of those subjects which are placed under the control of a national legislature. It is as necessary there should be courts of law and executive officers, to carry into effect the laws of the nation, as that there be courts and officers to execute the laws made by your state assemblies. There are many reasons why their decisions ought not to be left to courts instituted by particular states. A perfect uniformity must be observed throughout the whole union, or jealousy and unrighteousness will take place; and for a uniformity one judiciary must pervade the whole. . . . A legislative power, without a judicial and executive under their own control, is in the nature of things a nullity. . . . In all these matters and powers given to Congress, their ordinances must be the supreme law of the land, or they are nothing. They must have authority to enact any laws for executing their own powers, or those powers will be evaded by the artful and unjust. . . ."[76]

And to the allegation that the state governments would be so altered as in effect to be dissolved, the familiar charge of consolidation, Landholder replied: "No alteration in the state governments is even now proposed, but they are to remain identically the same that they are now. Some powers are to be given into the hands of your federal representatives, but these powers are all in their nature general, such as must be exercised by the whole or not at all, and such as are absolutely

[73] *Id.* at 155-56.
[74] *Id.* at 156.
[75] *Ibid.*
[76] *Id.* at 159-60.

necessary; or your commerce, the price of your commodities, your riches and your safety, will be the sport of every foreign adventurer. Why are we told of the dissolution of our state governments, when by this plan they are indissolubly linked? They must stand or fall, live or die together. The national legislature consists of two houses, a senate and house of representatives. The senate is to be chosen by the assemblies of the particular states; so that if the assemblies are dissolved, the senate dissolves with them. The national representatives are to be chosen by the same electors, and under the same qualifications, as choose the state representatives; so that if the state representation be dissolved, the national representation is gone of course. State representation and government is the very basis of the congressional power proposed."[77]

The Letters of Fabius.

Nine in number, these letters were written by John Dickinson and published in a Delaware newspaper in early 1788.

Fabius answered the charge of consolidation in terms of delegated and reserved powers. "As to the idea that this superintending sovereign will must of consequence destroy the subordinate sovereignties of the several states, it is begging a concession of the question, by inferring, that a manifest and great usefulness must necessarily end in abuse; and not only so, but it requires an extinction of the principle of all society; for the subordinate sovereignties, or, in other words, the undelegated rights of the several states, in a confederation, stand upon the very same foundation with the undelegated rights of individuals in a society, the federal sovereign will being composed of the subordinate sovereign wills of the several confederated states. . . . In short, the government of each state is, and is to be, sovereign and supreme in all matters that relate to each state only. It is to be subordinate barely in those matters that relate to the whole; and it will be their *own faults* if the several states suffer the federal sovereignty to interfere in things of their respective jurisdictions. An instance of such interference with regard to any single state, will be a dangerous precedent as to all, and therefore will be guarded against by all, as the trustees or servants of the several states will not dare, if they retain their senses, so to violate the independent sovereignty of their respective states, *that justly darling object* of American affections, to which they are responsible, besides being endeared by all the charities of life."[78]

Fabius emphasized the importance of the Senate as the forum for the representation of state interests. "Though small, let it be remembered, that it is to be created by the sovereignties of the several states;

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[77] *Id.* at 153-54.

[78] Dickinson, *The Letters of Fabius, op. cit. supra* note 5, at 179.

that is, by the persons, whom the people of each state shall judge to be most worthy, and who, surely, will be religiously attentive to making a selection, in which the interest and honor of their state will be so deeply concerned. It should be remembered too, that this is the same manner in which the members of Congress are now appointed; and that herein, the sovereignties of the states are so intimately involved, that however a renunciation of part of these powers may be desired by some of the states, it never will be obtained from the rest of them."[79]

Pamphlet of Noah Webster.

This Yale graduate who became a famous lexicographer had such unsatisfactory experiences in seeking enactment of copyright laws by state legislatures that he became an early advocate of a strong central government. He published his views on the subject in 1785 in a pamphlet entitled "Sketches of American Policy" which attracted the favorable attention of Washington and Madison. In 1787 he published a pamphlet, dedicated to Benjamin Franklin, which advocated adoption of the Constitution and from which the following extracts are taken.

The need for a strong national government was emphasized by Webster. "The present situation of our American states is very little better than a state of nature—Our boasted state sovereignties are so far from securing our liberty and property, that they, every moment, expose us to the loss of both. The state which commands the heaviest purse and longest sword, may at any moment, lay its weaker neighbor under tribute; and there is no superior power now existing, that can regularly oppose the invasion or redress the injury. From such liberty, O Lord, deliver us!"[80]

He discussed the charge that the powers granted to Congress by the Constitution were excessive, and sought to draw a line between national and state power. "The powers lodged in Congress are extensive; but it is presumed that they are not too extensive. The first object of the constitution is to *unite* the states into one *compact society*, for the purposes of government."[81] The question was: ". . . what powers must be collected and lodged in the supreme head or legislature of these states. The answer is easy: "The legislature must have exclusive jurisdiction in all matters in which the states have a mutual interest. There are some regulations in which all the states are equally concerned—there are others, which in their operation, are limited to one state. The first belongs to Congress—the last to the respective legislatures. No one state has a right to supreme control, in any affair in which the other states

[79] *Id.* at 169.

[80] N. Webster, *Sketches of American Policy, id.* at 55.

[81] *Id.* at 45.

have an interest, nor should Congress interfere in any affair which respects one state only. This is the general line of division, which the convention have endeavored to draw, between the powers of Congress and the rights of the individual states. The only question therefore is, whether the new constitution delegates to Congress any powers which do not respect the general interest and welfare of the United States. If these powers intrench upon the present sovereignty of any *state*, without having for an object the *collective interest* of the whole, the powers are too extensive. But if they do not extend to all concerns, in which the states have a mutual interest, they are too limited. If in any instance, the powers necessary for protecting the *general* interest interfere with the constitutional rights of an *individual* state, such state has assumed powers that are inconsistent with the safety of the United States, and which ought instantly to be resigned. Considering the states as individuals, on equal terms, entering into a social compact, no state has a right to any power which may prejudice its neighbors. If therefore the federal constitution has collected into the federal legislature no more power than is necessary for the *common defense and interest,* it should be recognized by the states, however, particular clauses may supersede the exercise of certain powers by the individual states.

"This question is of vast magnitude. The states have very high ideas of their separate sovereignty; although it is certain, that while each exists in its full latitude, we can have no *Federal sovereignty*. However flattered each state may be by its independent sovereignty, we can have no union, no respectability, no national character, and what is more, no national justice, till the states resign to one *supreme head* the exclusive power of *legislating, judging and executing,* in all matters of a general nature. Every thing of a private or provincial nature must still rest on the ground of the respective state constitutions.

"After examining the limits of the proposed congressional powers, I confess I do not think them too extensive—I firmly believe that the life, liberty and property of every man, and the peace and independence of each state, will be more fully secured under such a constitution of federal government, than they will under a constitution with more limited powers; and infinitely safer than under our boasted distinct sovereignties. It appears to me that Congress will have no more power than will be necessary for our union and general welfare; and such power they must have or we are in a wretched state."[82] "The constitution is generally good—it guarantees the *fundamental principles* of our several constitutions—it guards our rights—and while it vests extensive powers in Congress, it vests no more than are necessary for

[82] *Id.* at 45-46.

our union. Without powers lodged somewhere in a single body, fully competent to lay and collect taxes and duties—to adjust controversies between different states—to silence contending interests—to suppress insurrections—to regulate commerce—to treat with foreign nations, our confederation is a cobweb—liable to be blown asunder by every blast of faction that is raised in the remotest corner of the United States."[83]

Address to the Freemen of South Carolina by Dr. David Ramsay.

Ramsay was a physician and historian of Charleston, who had been a delegate from South Carolina to the Confederation Congress, where he had supported the various efforts to strengthen the central government. He was also a member of the South Carolina convention which ratified the Constitution.

Ramsay made reply to the charge that the powers of the national government were excessive and took too much away from the states. "If the thirteen states are to be united in reality, as well as in name, the obvious principle of the union will be, that the congress, or general government, should have power to regulate all general concerns. . . . When several parishes, counties, or districts, form a state, the separate interests of each must yield to the collective interest of the whole. When several states combine in one government, the same principles must be observed. These relinquishments of natural rights are not real sacrifices; each person, county, or state gains more than it loses, for it only gives up a right of injuring others, and obtains in return aid and strength to secure itself in the peaceable enjoyment of all remaining rights. If then we are to be a united people, the obvious ground of union must be, that all continental concerns should be managed by Congress—let us by those principles examine the new constitution. Look over the 8th section, which enumerates the powers of Congress, and point out one that is not essential on the before recited principles of union. . . . The opposers of the Constitution cannot show a single power delegated to Congress, that could be spared consistently with the welfare of the whole, not a single one taken from the states, but such as can be more advantageously lodged in the general government, than in that of the separate states. . . . Suffer not yourselves to be imposed upon by declamation. Ask the man who objects to the powers of Congress two questions: Is it not necessary that the supposed dangerous power should be lodged somewhere? And secondly, where can it be lodged, consistently with the general good, so well as in the general government?"[84]

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[83]*Id.* at 61-62.

[84]Ramsay, *Address to the Freemen of South Carolina, id.* at 373-75.

THE FEDERALIST PAPERS

The most extensive and intensive scholarly analysis of the Constitution published during the ratification campaign was, of course, the series of essays which appeared in the New York press under the pseudonym of Publius. Eighty-five in number, they were written by Hamilton, Madison, and John Jay. The authorship of some of the papers is in doubt, but most of them, fifty or more, were the work of Hamilton, somewhere near thirty were produced by Madison, and Jay wrote only five. Since the papers of Hamilton and Madison offer different insights into the subject matter of this study, they will be examined separately.

The Essays of Hamilton.

Hamilton portrayed graphically the insufficiency of the Articles, which he called an "imbecility" which had brought the Union to "almost the last stage of national humiliation." "In our case, the concurrence of thirteen distinct sovereign wills is requisite, under the Confederation, to the complete execution of every important measure that proceeds from the Union. It has happened as was to have been foreseen. The measures of the Union have not been executed; the delinquencies of the States have, step by step, matured themselves to an extreme which has, at length, arrested all the wheels of the national government, and brought them to an awful stand."[85] Of those who advocated a stronger system of government under the system of the Articles, he wrote, "They seem still to aim at things repugnant and irreconcilable; at an augmentation of federal authority, without a diminution of State authority; at sovereignty in the Union, and complete independence in the members. They still, in fine, seem to cherish with blind devotion the political monster of an *imperium in imperio*."[86] The evils experienced under the Articles, he asserted, did "not proceed from minute or partial imperfections, but from fundamental errors in the structure of the building, which cannot be amended otherwise than by an alteration in the first principles and main pillars of the fabric."[87] Thus did Hamilton reject any continuance of the conception of a confederation of sovereign states as found in the Articles.

The first step in the remedy was to change the basic characteristic of the Confederation. "The great and radical vice in the construction of the existing Confederation," Hamilton wrote: "is in the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of which they consist. Though this

[85] THE FEDERALIST No. 15, at 90-91 (Lodge ed. 1888) (Hamilton).

[86] *Id.* at 86.

[87] *Ibid.*

principle does not run through all the powers delegated to the Union, yet it pervades and governs those on which the efficacy of the rest depends. Except as to the rule of apportionment, the United States has an indefinite discretion to make requisitions for men and money; but they have no authority to raise either, by regulations extending to the individual citizens of America. The consequence of this is, that though in theory their resolutions concerning those objects are laws, constitutionally binding on the members of the Union, yet in practice they are mere recommendations which the States observe or disregard at their option."[88] He urged that "we must resolve to incorporate into our plan those ingredients which may be considered as forming the characteristic difference between a league and a government; we must extend the authority of the Union to the persons of the citizens,—the only proper objects of government."[89] Later, he repeated the point: ". . . if we are in earnest about giving the Union energy and duration, we must abandon the vain project of legislating upon the states in their collective capacities; we must extend the laws of the federal government to the individual citizens of America. . . ."[90] And again: ". . . a sovereignty over sovereigns, a government over governments, a legislation for communities, as contradistinguished from individuals, as it is a solecism in theory, so in practice it is subversive of the order and ends of civil polity. . . ."[91]

Under such a system, operating on and through states, laws enacted by Congress would always be unenforceable. "If, therefore, the measures of the Confederacy cannot be executed without the intervention of the particular administrations, there will be little prospect of their being executed at all. The rulers of the respective members, whether they have a constitutional right to do it or not, will undertake to judge of the propriety of the measures themselves."[92] Therefore, Hamilton wrote, "The next most palpable defect of the subsisting Confederation, is the total want of a SANCTION to its laws. The United States, as now composed, have no powers to exact obedience, or punish disobedience to their resolutions. . . ."[93] No express power was granted, and any power resting on inference and construction was precluded by Article 2, which declared " 'that each State shall retain every power, jurisdiction, and right, not *expressly* delegated to the United States in Congress assembled.' " This provision, he noted, "has been of late a repeated theme of the eulogies of those who oppose the new Constitution, and the want of which, in that plan, has been the subject of much plausible

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[88] *Ibid.*

[89] *Id.* at 88.

[90] *Id.*, No. 23, at 137-38.

[91] *Id.*, No. 20, at 119.

[92] *Id.*, No. 15, at 90.

[93] *Id.*, No. 21, at 120.

animadversion, and severe criticism."[94] Because of it, however, the United States afforded "the extraordinary spectacle of a government destitute even of the shadow of constitutional power to enforce the execution of its own laws."[95]

Hamilton wrote that another circumstance which crowned the defects of the Confederation was the want of a judiciary power. "Laws are a dead letter without courts to expound and define their true meaning and operation."[96] The same was true of treaties of the United States, and "to produce uniformity in these determinations, they ought to be submitted, in the last resort, to ONE SUPREME TRIBUNAL.... If there is in each State a court of final jurisdiction, there may be as many different final determinations on the same point as there are courts . . . all nations have found it necessary to establish one court paramount to the rest, possessing a general superintendence, and authorized to settle and declare in the last resort a uniform rule of civil justice."[97] Particularly was this true in the United States. "This is the more necessary where the frame of the government is so compounded that the laws of the whole are in danger of being contravened by the laws of the parts. In this case, if the particular tribunals are invested with a right of ultimate jurisdiction, besides the contradictions to be expected from differences of opinion there will be much to fear from the bias of local views and prejudices, and from the interference of local regulations."[98]

All of the foregoing defects—the inability of the government to act on individuals, the lack of any sanction for its laws, and the absence of a judiciary—indicated the nature of the government which was necessary. "The result of these observations to an intelligent mind must be clearly this, that if it be possible at any rate to construct a federal government capable of regulating the common concerns and preserving the general tranquillity, it must be founded, as to the objects committed to its care, upon the reverse of the principle contended for by the opponents of the proposed Constitution. It must carry its agency to the persons of the citizens. It must stand in need of no intermediate legislations; but must itself be empowered to employ the arm of the ordinary magistrate to execute its own resolutions. The majesty of the national authority must be manifested through the medium of the courts of justice. The government of the Union, like that of each State, must be able to address itself immediately to the hopes and fears of individuals; and to attract to its support those passions which have the strongest influence upon the human heart.

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[94] *Ibid.*

[95] *Ibid.*

[96] *Id.*, No. 22, at 132.

[97] *Id.* at 133.

[98] *Ibid.*

It must, in short, possess all the means, and have a right to resort to all the methods, of executing the powers with which it is intrusted, that are possessed and exercised by the governments of the particular States."[99]

Hamilton devoted many of his essays to demonstrating the inadequacy of the powers of Congress under the Articles and defending the necessity of the powers conferred on Congress in the Constitution. His approach toward the latter was extremely latitudinarian. "A government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care, and to the complete execution of the trusts for which it is responsible, free from every other control but a regard to the public good and to the sense of the people."[100] Referring to the military powers of Congress, he wrote, "These powers ought to exist without limitation, *because it is impossible to foresee or define the extent and variety of national exigencies, or the corresponding extent and variety of the means which may be necessary to satisfy them.*"[101] The same was true of Congress's power of taxation. "As revenue is the essential engine by which the means of answering the national exigencies must be procured, the power of procuring that article in its full extent must necessarily be comprehended in that of providing for those exigencies."[102] and "As theory and practice conspire to prove that the power of procuring revenue is unavailing when exercised over the States in their collective capacities, the federal government must of necessity be invested with an unqualified power of taxation in the ordinary modes."[103]

A proper evaluation of Congressional powers rested on "certain primary truths, or first principles," which Hamilton likened to the maxims of geometry. "Of the same nature are those other maxims in ethics and politics, that there cannot be an effect without a cause; that the means ought to be proportioned to the end; that every power ought to be commensurate to its object; that there ought to be no limitation of a power destined to effect a purpose which is itself incapable of limitation."[104] It was therefore "both unwise and dangerous to deny the federal government an unconfined authority, as to all those objects which are intrusted to its management."[105] Furthermore, those objects were not susceptible of static ascertainment. Discussing the concurrent power of taxation, he predicted that "in a short course of time, the wants of the States will naturally reduce themselves within *a*

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[99] *Id.*, No. 16, at 95.
[100] *Id.*, No. 31, at 182.
[101] *Id.*, No. 23, at 136.
[102] *Id.*, No. 31, at 182.
[103] *Ibid.*
[104] *Id.* at 180.
[105] *Id.*, No. 23, at 139.

very narrow compass," so that comparing "the objects that will require federal provision in respect to revenue, and those which will require a State provision," he said that "We shall discover that the former are altogether unlimited, and that the latter are circumscribed within very moderate bounds."[106]

The probability of expanded national activity due to future exigencies dictated the proper view to be taken of the extent of national powers. "In pursuing this inquiry, we must bear in mind that we are not to confine our view to the present period, but to look forward to remote futurity. Constitutions of civil government are not to be framed upon a calculation of existing exigencies, but upon a combination of these with the probable exigencies of ages, according to the natural and tried course of human affairs. Nothing, therefore, can be more fallacious than to infer the extent of any power, proper to be lodged in the national government, from an estimate of its immediate necessities. There ought to be a CAPACITY to provide for future contingencies as they may happen; and as these are illimitable in their nature, it is impossible safely to limit that capacity."[107]

Hamilton's reply to the attacks on the "necessary and proper" and "supremacy" clauses was an ingenious evasion. "These two clauses . . . have been held up to the people in all the exaggerated colors of misrepresentation as the pernicious engines by which their local governments were to be destroyed . . . and yet, strange as it may appear . . . it may be affirmed with perfect confidence that the constitutional operation of the intended government would be precisely the same, if these clauses were entirely obliterated, as if they were repeated in every acticle. They are only declaratory of a truth which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government, and vesting it with certain specified powers."[108] To demonstrate the validity of this assertion, he asked: "What is a power, but the ability or faculty of doing a thing? What is the ability to do a thing, but the power of employing the *means* necessary to its execution? What is a LEGISLATIVE power, but a power of making LAWS? What are the *means* to execute a LEGISLATIVE Power, but LAWS? What is the power of laying and collecting taxes, but a *legislative power*, or a power of *making laws*, to lay and collect taxes? What are the proper means of executing such a power, but *necessary* and *proper* laws?"[109]

This approach was applicable to all powers declared in the Constitution. ". . . it is *expressly* to execute these powers that the sweeping clause, as it has been affectedly called, authorizes the national legislature to pass all *necessary* and *proper* laws. If there is anything excep-

[106] *Id.*, No. 34, at 195, 196.

[107] *Id.* at 196.

[108] *Id.*, No. 33, at 190.

[109] *Id.* at 190-91.

tionable, it must be sought for in the specific powers upon which this general declaration is predicated. The declaration itself, though it may be chargeable with tautology or redundancy, is at least perfectly harmless."[110] Asking "Why then was it introduced?" Hamilton's answer gave small comfort to the state sovereignty devotees. "The answer is, that it could only have been done for greater caution, and to guard against all cavilling refinements in those who might hereafter feel a disposition to curtail and evade the legitimate authorities of the Union. The Convention probably foresaw, what it has been a principal aim of these papers to inculcate, that the danger which most threatens our political welfare is that the state governments will finally sap the foundations of the Union; and might therefore think it necessary, in so cardinal a point, to leave nothing to construction."[111]

So far as the supremacy clause was concerned, Hamilton's reply was as follows: "But it is said that the laws of the Union are to be the *supreme law* of the land. But what inference can be drawn from this, or what would they amount to, if they were not to be supreme? It is evident that they would amount to nothing. A LAW, by the very meaning of the term, includes supremacy. It is a rule which those to whom it is prescribed are bound to observe. This results from every political association. If individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers entrusted to it by its constitution, must necessarily be supreme over those societies, and the individuals of whom they are composed. It would otherwise be a mere treaty, dependent on the good faith of the parties, and not a government, which is only another word for POLITICAL POWER AND SUPREMACY."[112]

As extensive as the national powers were, however, Hamilton apparently recognized a constitutional division of power between nation and states. In the course of denying that Congress's power of taxation would deprive the states of a concurrent power, he wrote: "An entire consolidation of the States into one complete national sovereignty would imply an entire subordination of the parts; and whatever powers might remain in them, would be altogether independent on the general will. But as the plan of the Convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, exclusively delegated to the United States. This exclusive delegation, or rather this alienation, of State sovereignty, would

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[110] *Id.* at 191.

[111] *Ibid.*

[112] *Id.* at 192-93.

only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the states would be absolutely and totally *contradictory* and *repugnant*."[113] And again: "The necessity of a concurrent jurisdiction in certain cases results from the division of the sovereign power; and the rule that all authorities, of which the states are not explicitly divested in favor of the Union, remain with them in full vigor, is not a theoretical consequence of that division, but is clearly admitted by the whole tenor of the instrument which contains the articles of the proposed Constitution."[114]

But was it not possible that the powers of Congress, extensive as they would be under the Constitution, would be used to invade the residual area of state authority? Hamilton took cognizance of the objection that national legislation for individual citizens "would tend to render the government of the Union too powerful, and to enable it to absorb those residual authorities, which it might be judged proper to leave with the States for local purposes."[115] His answer was that he simply did not think it would happen. "The regulation of the mere domestic police of a State appears to me to hold out slender allurements to ambition. . . . The administration of private justice between the citizens of the same State, the supervision of agriculture and of other concerns of a similar nature, all those things, in short, which are proper to be provided for by local legislation, can never be desirable cares of a general jurisdiction."[116] The danger of encroachment was from the other direction. "It should not be forgotten that a disposition in the State governments to encroach upon the rights of the Union is quite as probable as a disposition in the Union to encroach upon the rights of the State governments."[117] Actually, "It will always be far more easy for the State governments to encroach upon the national authorities, than for the national authorities to encroach upon the State authorities. The proof of this proposition turns upon the greater degree of influence which the State governments . . . will generally possess over the people. . . ."[118]

Although discounting the probability, Hamilton admitted the possibility. After asserting that under the Constitution the states would retain a concurrent power of taxation, he wrote: "And making this concession, I affirm that (with the sole exception of duties on imports

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[113] *Id.*, No. 32, at 186.
[114] *Id.* at 189.
[115] *Id.*, No. 17, at 97.
[116] *Id.*, No. 17, at 98.
[117] *Id.*, No. 31, at 184.
[118] *Id.*, No. 17, at 98.

and exports) they would, under the plan of the convention, retain that authority in the most absolute and unqualified sense; and that an attempt on the part of the national government to abridge them in the exercise of it, would be a violent assumption of power, unwarranted by any article or clause of the Constitution."[119] And again, after discussing the supremacy clause, *supra*, he wrote: "But it will not follow from this doctrine that acts of the larger society which are *not pursuant* to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land. These will be merely acts of usurpation, and will deserve to be treated as such."[120]

But who was to determine the extent of the powers of Congress and thus determine whether a usurpation had occurred? Hamilton's answer was: "But it may be again asked, Who is to judge of the *necessity* and *propriety* of the laws to be passed for executing the powers of the Union? I answer, first, that this question arises as well and as fully upon the simple grant of those powers as upon the declaratory clause; and I answer, in the second place, that the national government, like every other, must judge, in the first instance, of the proper exercise of its powers, and its constituents in the last."[121] One medium through which the the constituents could protest was ". . . the State legislatures, who will always be not only vigilant but suspicious and jealous guardians of the rights of the citizens against encroachments from the federal government, will constantly have their attention awake to the conduct of the national rulers, and will be ready enough, if any thing improper appears, to sound the alarm to the people, and not only to be the VOICE, but, if necessary, the ARM of their discontent."[122] Hamilton wrote that "It may safely be received as an axiom in our political system, that the State governments will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authority . . . they can at once adopt a regular plan of opposition, in which they can combine all the resources of the community. They can readily communicate with each other in the different States, and unite their common forces for the protection of their common liberty."[123]

Whatever Hamilton had in mind when he wrote the foregoing, it seems clear he did not contemplate that the states should have the legal right to determine the question or to interpose their authority between that of the national government and the citizens. As to the possibility that ". . . if any State should be disaffected to the authority of the Union, it could at any time obstruct the execution of its

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[119] *Id.*, No. 32, at 185.
[120] *Id.*, No. 33, at 193.
[121] *Id.*, No. 33, at 192.
[122] *Id.*, No. 26, at 157.
[123] *Id.*, No. 28, at 166, 167.

laws. . . ."[124] Hamilton's answer was to deny any such right in a system where the national government acted directly upon individuals. There was an ". . . essential difference between a mere NON-COMPLIANCE and a DIRECT and ACTIVE RESISTANCE. If any interposition of the State legislatures be necessary to give effect to a measure of the Union, they have only NOT TO ACT, or to ACT EVASIVELY, and the measure is defeated. . . . But if the execution of the laws of the national government should not require the intervention of the State legislatures, if they were to pass into immediate operation upon the citizens themselves, the particular governments could not interrupt their progress without an open and violent exertion of an unconstitutional power. No omissions nor evasions would answer the end. They would be obliged to act, and in such a manner as would leave no doubt that they had encroached on the national rights."[125]

What protection, then, did the states have against unconstitutional exercises of national power? And who was to determine the question of constitutionality? On these questions, Hamilton wrote that "If the federal government should overpass the just bounds of its authority and make a tyrannical use of its powers, the people, whose creature it is, must appeal to the standard they have formed, and take such measures to redress the injury done to the Constitution as the exigency may suggest and prudence justify."[126] And how to appeal to the standard? The answer given by Hamilton was through the judiciary. "The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority. . . . Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void."[127] Hamilton denied ". . . that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments. . . . It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body."[128]

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[124] *Id.*, No. 16, at 95.
[125] *Id.*, No. 16, at 95.
[126] *Id.*, No. 33, at 192.
[127] *Id.*, No. 78, at 484, 485.
[128] *Id.*, No. 78, at 484, 485.

Hamilton made it equally clear that the federal courts would enforce the supremacy of the Constitution and national law against the states. "What, for instance, would avail restrictions on the authority of the State legislatures, without some constitutional mode of enforcing the observance of them? The States, by the plan of the convention, are prohibited from doing a variety of things, some of which are incompatible with the interests of the Union, and others with the principles of good government. . . . No man of sense will believe, that such prohibitions would be scrupulously regarded, without some effectual power in the government to restrain or correct the infractions of them. This power must either be a direct negative on the State laws, or an authority in the federal courts to overrule such as might be in manifest contravention of the articles of Union. There is no third course I can imagine. The latter appears by the convention preferable to the former, and, I presume, will be most agreeable to the States."[129]

The enforcement of national supremacy also justified the power of Congress to create inferior federal courts. "But why, it is asked, might not the same purpose have been accomplished by the instrumentality of the State courts? . . . There are, in my opinion, substantial reasons against such a provision: the most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes; whilst every man may discover, that courts constituted like those of some of the States would be improper channels of the judicial authority of the Union. State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws."[130]

Notwithstanding all the foregoing, Hamilton sought to soothe the opposition by asserting that it was still a "federal" government for which the Constitution provided. "The definition of a *confederate republic* seems simply to be 'an assemblage of societies,' or an association of two or more states into one state. The extent, modifications, and objects of the federal authority are mere matters of discretion. So long as the separate organization of the members be not abolished; so long as it exists, by a constitutional necessity, for local purposes; though it be in perfect subordination to the general authority of the union, it would still be, in fact and in theory, an association of states, or a confederacy. The proposed Constitution, so far from implying an abolition of the State governments, makes them constituent parts of the national sovereignty, by allowing them a direct representation in the Senate, and leaves in their possession certain exclusive and very important portions

[129]*Id.*, No. 80, at 494, 495.
[130]*Id.*, No. 81, at 506.

of sovereign power. This fully corresponds, in every rational import of the terms, with the idea of a federal government."[131]

The Essays of Madison.

Madison's contribution to the Federalist Papers was predicated upon the inadequacy of the Articles which had been explicated by Hamilton. "It has been shown in the course of these papers, that the existing Confederation is founded on principles which are fallacious; that we must consequently change this first foundation, and with it the superstructure resting upon it."[132] This "first foundation," of course, was that the Articles provided for a confederation of sovereign states, and Madison therefore undertook to answer the criticism based on the abandonment of this principle. " 'But it was not sufficient,' say the adversaries of the proposed Constitution, 'for the convention to adhere to the republican form. They ought, with equal care, to have preserved the *federal* form, which regards the Union as a *Confederacy* of sovereign states; instead of which, they have framed a *national* government, which regards the Union as a consolidation of the states.' "[133] Madison's answer, which did not deny the national character of the new government in its most important aspects, sought to deemphasize this characteristic by calling attention to features he characterized as federal. His treatment of the matter is worth setting forth in some detail.

In order to ascertain the real character of the government, Madison considered it in five separate relations. The first of these was to the foundation on which it was to be established. "On examining the first relation, it appears, on one hand, that the Constitution is to be founded on the assent and ratification of the people of America, given by deputies elected for the special purpose; but, on the other, that this assent and ratification is to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong. It is to be the assent and ratification of the several States, derived from the supreme authority in each State,—the authority of the people themselves. The act, therefore, establishing the Constitution, will not be a *national,* but a *federal* act. . . . Were the people regarded in this transaction as forming one nation, the will of the majority of the whole people of the United States would bind the minority. . . . Each state, in ratifying the Constitution, is considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act. In this relation, then, the new Constitution will, if established, be a *federal,* and not a *national* Constitution."[134]

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[131] *Id.*, No. 9, at 50, 51.
[132] *Id.*, No. 37, at 216, 217.
[133] *Id.*, No. 39, at 235.
[134] *Id.*, No. 39, at 236, 237.

The second relation was to the sources from which the new government would draw its powers. "The House of Representatives will derive its powers from the people of America. . . . So far the government is *national,* not *federal.* The Senate, on the other hand, will derive its powers from the States, as political and coequal societies. . . . So far the government is *federal,* not *national.* The executive power will be derived from a very compound source. . . . From this aspect of the government, it appears to be of a mixed character, presenting at least as many *federal* as *national* features."[135]

The third relation was the operation of the powers of the government. "The difference between a federal and national government, as it relates to the *operation of the government,* is supposed to consist in this, that in the former the powers operate on the political bodies composing the Confederacy, in their political capacities; in the latter, on the individual citizens composing the nation, in their individual capacities. On trying the Constitution by this criterion, it falls under the *national,* not the *federal* character . . . the operation of the government on the people, in their individual capacities, in its ordinary and most essential proceedings, may, on the whole, designate it, in this relation, a *national* government."[136]

The fourth relation was the extent of the powers of the new government. "But if the government be national with regard to the *operation* of its powers, it changes its aspect again when we contemplate it in relation to the *extent* of its powers. . . . In this relation . . . the proposed government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several states a residuary and inviolable sovereignty over all other subjects. It is true that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide, is to be established under the general government. . . . Some such tribunal is clearly essential to prevent an appeal to the sword and a dissolution of the compact; and that it ought to be established under the general rather than under the local governments, or, to speak more properly, that it could be safely established under the first alone, is a position not likely to be combated."[137]

The fifth relation was to the authority by which future changes in the government were to be introduced. "If we try the Constitution by its last relation to the authority by which amendments are to be made, we find it neither wholly *national* or wholly *federal.* Were it wholly national, the supreme and ultimate authority would reside in the *majority* of the people of the Union. . . . Were it wholly federal, on the

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[135] *Id.,* No. 39, at 237.
[136] *Id.,* No. 39, at 237, 238.
[137] *Id.,* No. 39, at 238, 239.

other hand, the concurrence of each State in the Union would be essential to every alteration that would be binding on all. . . . In requiring more than a majority, and particularly in computing the proportion by *States*, not by *citizens*, it departs from the *national* and advances towards the *federal* character; in rendering the concurrence of less than the whole number of States sufficient, it loses again the *Federal* and partakes of the *national* character." Madison's conclusion was that "The proposed Constitution, therefore, is, in strictness, neither a national nor a federal Constitution, but a composition of both."[138]

Madison devoted four essays—41 through 45—to discussing the sum or quantity of powers vested in the general government, including restraints imposed on the states. This was done by reducing the powers into different classes as they related to the following different objects: "1. Security against foreign danger; 2. Regulation of the intercourse with foreign nations; 3. Maintenance of harmony and proper intercourse among the States; 4. Certain miscellaneous objects of general utility; 5. Restraints of the States from certain injurious acts; 6. Provisions for giving due efficacy to all these powers."[139] The first five classes were vigorously defended, but the discussion most relevant to the subject of this thesis was in connection with the sixth class. The first provision examined by Madison was the "necessary and proper" clause. "Few parts of the Constitution have been assailed with more intemperance than this; yet on a fair investigation of it, no part can appear more completely invulnerable. Without the *substance* of this power, the whole Constitution would be a dead letter."[140]

Madison said there were four other possible methods which the Constitution might have taken on this subject, and proceeded to show why each was inferior to the course actually taken. First, "They might have copied the second article of the existing Confederation, which would have prohibited the exercise of any power not *expressly* delegated. . . ." Had the Convention done this, ". . . it is evident that the new Congress would be continually exposed, as their predecessors have been, to the alternative of construing the term *'expressly'* with so much rigor, as to disarm the government of all real authority whatever, or with so much latitude as to destroy altogether the force of the restriction."[141] Second, ". . . they might have attempted a positive enumeration of the powers comprehended under the general terms 'necessary and proper.' " Had the Convention done this, ". . . the attempt would have involved a complete digest of laws on every subject to which the Constitution relates."[142] Third, ". . . they might have attempted a negative

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[138] *Id.*, No. 39, at 239.
[139] *Id.*, No. 41, at 250.
[140] *Id.*, No. 44, at 280-81.
[141] *Id.*, No. 44, at 281.
[142] *Ibid.*

enumeration of them, by specifying the powers excepted from the general definition. . . ." Had the Convention done this, ". . . the task would have been no less chimerical; and would have been liable to this further objection, that every defect in the numeration would have been equivalent to a positive grant of authority."[143] Finally, ". . . they might have been altogether silent on the subject, leaving those necessary and proper powers to construction and inference." Had the Convention done this, ". . . there can be no doubt that all the particular powers requisite as means of executing the general powers would have resulted to the government, by unavoidable implication. No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included. Had this last method, therefore, been pursued by the convention, every objection now urged against their plan would remain in all its plausibility."[144] Madison was here in full agreement with Hamilton, but he then added one cogent reason for the inclusion of the clause. This was that if the Constitution were silent on the subject, ". . . the real inconveniency would be incurred of not removing a pretext which may be seized on critical occasions for drawing into question the essential powers of the Union."[145]

The second provision for giving efficacy to all the powers of the national government was the "supremacy" clause. Without this clause, Madison said the Constitution ". . . would have been evidently and radically defective. To be fully sensible of this, we need only suppose for a moment that the supremacy of the State constitutions had been left complete by a saving clause in their favor . . . as these constitutions invest the State legislatures with absolute sovereignty . . . the new Congress would have been reduced to the same impotent condition with their predecessors. . . . In fine, the world would have seen, for the first time, a system of government founded on an inversion of the fundamental principles of all government; it would have seen the authority of the whole society everywhere subordinate to the authority of the parts; it would have seen a monster, in which the head was under the direction of the members."[146] After all, it was one of the fallacies of the Articles that they ". . . inconsiderately endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the Union, with complete sovereignty in the States; to subvert a mathematical axiom, by taking away a part, and letting the whole remain."[147]

In spite of the scope and supremacy of national power, however,

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[143] *Id.*, No. 44, at 281-82.

[144] *Ibid.*

[145] *Id.*, No. 44, at 282.

[146] *Id.*, No. 44, at 283, 284.

[147] *Id.*, No. 42, at 264.

Madison, like Hamilton, recognized the concept of a division of powers. Madison wrote: "In the first place it is to be remembered that the general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects, which concern all the members of the republic, but which are not to be attained by the separate provisions of any. The subordinate governments, which can extend their care to all these other objects which can be separately provided for, will retain their due authority and activity. Were it proposed by the plan of the convention to abolish the governments of the particular States, its adversaries would have some ground for their objection; though it would not be difficult to show that if they were abolished the general government would be compelled, by the principle of self-preservation, to reinstate them in their proper jurisdiction."[148]

Again, in defending the power of the Convention to write a new Constitution rather than merely to amend the Articles, Madison wrote: "Will it be said that the *fundamental principles* of the Confederation were not within the purview of the convention, and ought not to have been varied? I ask, What are these principles? Do they require that, in the establishment of the Constitution, the States should be regarded as distinct and independent sovereigns? They are so regarded by the Constitution proposed. . . . Do these principles, in fine, require that the powers of the general government should be limited, and that, beyond this limit, the States should be left in possession of their sovereignty and independence? We have seen that in the new government, as in the old, the general powers are limited; and that the States, in all unenumerated cases, are left in the enjoyment of their sovereign and independent jurisdiction."[149]

Madison attacked the question whether the whole mass of the powers of the national government ". . . will be dangerous to the portion of authority left in the several States."[150] Madison's answer first was that it was not likely to happen. "Several important considerations . . . discountenance the supposition that the operation of the federal government will by degrees prove fatal to the State governments."[151] One such consideration was the dependence of the federal government on the states. "The State governments may be regarded as constituent and essential parts of the federal government; whilst the latter is nowise essential to the operation or organization of the former. Without the intervention of the State legislatures, the President of the United States cannot be elected at all. . . . The Senate will be elected

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[148] *Id.*, No. 14, at 79.
[149] *Id.*, No. 40, at 243, 244.
[150] *Id.*, No. 45, at 286.
[151] *Id.*, No. 45, at 286.

absolutely and exclusively by the State legislatures."[152] Another consideration was the powers vested respectively in the national and state governments, and here Madison used language which seemed to support a strict construction approach to national powers. "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State. . . . If the new Constitution be examined with accuracy and candor, it will be found that the change which it proposes consists much less in the addition of NEW POWERS to the Union, than in the invigoration of its ORIGINAL POWERS."[153]

Another consideration conducive to the protection of state powers was that it was ". . . beyond doubt that the first and most natural attachment of the people will be to the governments of their respective States."[154] This partiality for local government would be shared by the state's representatives in Congress. "The prepossessions, which the members themselves will carry into the federal government, will generally be favorable to the States; whilst it will rarely happen, that the members of the State governments will carry into the public councils a bias in favor of the general government. A local spirit will infallibly prevail much more in the members of Congress, than a national spirit will prevail in the legislatures of the particular States. . . . For the same reason that the members of the State legislatures will be unlikely to attach themselves sufficiently to national objects, the members of the federal legislature will be likely to attach themselves too much to local objects. The States will be to the latter what counties and towns are to the former. Measures will too often be decided according to their probable effect, not on the national prosperity and happiness, but on the prejudices, interests, and pursuits of the government and people of the individual States. . . . I mean not by these reflections to insinuate, that the new federal government will not embrace a more enlarged plan of policy than the existing government may have pursued; much less, that its views will be as confined as those of the State legislatures; but only that it will partake sufficiently of the spirit of both, to be disinclined to invade the rights of the individual States, or the prerogatives of their governments."[155]

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[152] *Id.*, No. 45, at 288.

[153] *Id*, No. 45, at 290, 291.

[154] *Id.*, No. 46, at 292-93.

[155] *Id.*, No. 46, at 295-96.

And in Congress, the equal representation of the states in the Senate was a potent political protection. "In this spirit it may be remarked, that the equal vote allowed to each State is at once a constitutional recognition of the portion of sovereignty remaining in the individual States, and an instrument for preserving that residual sovereignty. So far the equality ought to be no less acceptable to the large than to the small States; since they are not less solicitous to guard, by every possible expedient, against an improper consolidation of the States into one simple republic."[156] The importance of this protective device was proved by the exception to the amending power that no state should be deprived of its equal representation in the Senate. "The exception in favor of the equality of suffrage in the Senate was probably meant as a palladium to the residuary sovereignty of the States, implied and secured by that principle of representation in one branch of the legislature; and was probably insisted on by the States particularly attached to that equality."[157] As a matter of fact, this political power was so potent that it necessitated an oath of allegiance to the Constitution. "It has been asked why it was thought necessary, that the State magistracy should be bound to support the federal Constitution, and unnecessary that a like oath should be imposed on the officers of the United States, in favor of the State constitutions. . . . The members of the federal government will have no agency in carrying the State constitutions into effect. The members and officers of the State governments, on the contrary, will have an essential agency in giving effect to the federal Constitution."[158]

But, notwithstanding the foregoing considerations, did not the possibility remain of national usurpation of state power? In his discussion of the "necessary and proper" clause, Madison wrote: "If it be asked what is to be the consequence, in case the Congress shall misconstrue this part of the Constitution, and exercise powers not warranted by its true meaning, I answer, the same as if they should misconstrue or enlarge any other power vested in them. . . ."[159] His answer was essentially the same as Hamilton's. "In the first instance, the success of the usurpation will depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts; and in the last resort a remedy must be obtained from the people, who can, by the election of more faithful representatives, annul the acts of the usurpers."[160]

No power existed in the states as such to prevent such an exercise of power from becoming operative as a matter of law, for the reason

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[156] *Id.*, No. 62, at 386.
[157] *Id.*, No. 43, at 275.
[158] *Id.*, No. 44, at 284-85.
[159] *Id.*, No. 44, at 283.
[160] *Ibid.*

that "Under the proposed Constitution, the federal acts will take effect without the necessary intervention of the individual States. They will depend merely on the majority of votes in the federal legislature. . . ."[161]

As a matter of politics, however, the states might prevent any effective enforcement of a federal act considered to be a usurpation of state power, and on this point Madison used language amazingly prophetic of the situation in the Deep South in the 1950's and 1960's: "The disquietude of the people; their repugnance and, perhaps, their refusal to cooperate with the officers of the Union; the frowns of the executive magistracy of the State; the embarrassments created by legislative devices, which would often be added on such occasions, would oppose, in any State, difficulties not to be despised; would form, in a large State, very serious impediments; and where the sentiments of several adjoining States happened to be in unison, would present obstructions which the federal government would hardly be willing to encounter."[162]

But whatever solace particular sentences might have given, or been intended to give, to the devotees of state sovereignty, on net balance Madison's essays give small reason for comfort. Relatively speaking, federal law was more important than state law and would inevitably be of an expansive nature. Defending two year terms for representatives rather than annual elections as in the states, Madison wrote: "In a single State, the requisite knowledge relates to the existing laws, which are uniform throughout the State, and with which all the citizens are more or less conversant; and to the general affairs of the State, which lie within a small compass, are not very diversified, and occupy much of the attention and conversation of every class of people. The great theatre of the United States presents a very different scene . . . the public affairs of the Union are spread throughout a very extensive region . . . the business of federal legislation must continue so far to exceed, both in novelty and difficulty, the legislative business of a single State, as to justify the longer period of service assigned to those who are to transact it."[163]

If this resulted in federal encroachment in areas previously reversed to the states, Madison reminded that "The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes. The adversaries of the Constitution seem to have lost sight of the people altogether in their reasonings on this subject; and to have viewed these different establishments, not only as mutual rivals and enemies, but as uncontrolled by any common superior in their efforts to usurp the

[161] *Id.*, No. 54, at 344.
[162] *Id.*, No. 46, at 296.
[163] *Id.*, No. 53, at 336, 367.

authorities of each other . . . the ultimate authority, wherever the derivative may be found, resides in the people alone, and that it will not depend merely on the comparative ambitions or address of the different governments, whether either, or which of them, will be able to enlarge its sphere of jurisdiction at the expense of the other. Truth, no less than decency, requires that the event in every case should be supposed to depend on the sentiments and sanction of their common constituents."[164]

Madison was explicit that state sovereignty was an expendable value. "But if the Union, as has been shown, be essential to the security of the people of America against foreign danger; if it be essential to their security against contentions and wars among the different States; if it be essential to guard them against those violent and oppressive factions which embitter the blessings of liberty . . . if, in a word, the Union be essential to the happiness of the people of America, is it not preposterous, to urge as an objection to a government, without which the objects of the Union cannot be attained, that such a government may derogate from the importance of the governments of the individual States? Was, then, the American Revolution effected, was the American Confederacy formed, was the precious blood of thousands split, and the hard-earned substance of millions lavished, not that the people of America should enjoy peace, liberty, and safety, but that the government of the individual States, that particular municipal establishments, might enjoy a certain extent of power, and be arrayed with certain dignities and attributes of sovereignty? . . . [T]he real welfare of the great body of the people, is the supreme object to be pursued; and . . . no form of government whatever has any other value than as it may be fitted for the attainment of this object. Were the plan of the convention adverse to the public happiness, my voice would be, Reject and plan. Were the Union itself inconsistent with the public happiness, it would be, Abolish the Union. In like manner, as far as the sovereignty of the States cannot be reconciled to the happiness of the people, the voice of every good citizen must be, Let the former be sacrified to the latter."[165]

[EDITOR'S NOTE: This article will be continued in the March 1961 issue of the *Mississippi Law Journal*.]

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[164]*Id.*, No. 46, at 292.

[165]*Id.*, No., 45 at 286-87.

APPLICABILITY OF THE DEAD MAN STATUTE TO NEGLIGENCE ACTIONS IN MISSISSIPPI

*Moran M. Pope, Jr.**

[EDITOR'S NOTE: The dead man statute, the wrongful death statute, and the interaction of the two statutes are discussed at length in Coker, *Competency of a Defendant to Testify When Sued Under the Wrongful Death Statute,* 29 MISS. L.J. 258 (1958). Since the publication of that article, *Hawkins, Adm'r v. Rye* was decided by the Supreme Court of Mississippi and involved the problem anticipated by the author of the article. The following article, which is confined to a discussion of that case, and the above mentioned article are complementary.]

For more than a hundred years after the dead man statute[1] and the wrongful death statute[2] were placed in the Mississippi Code, they failed to get involved in the same lawsuit so as to cause the Mississippi Supreme Court to rule on any possible conflict between them. But as inevitably happens in law, the twain did meet in 1958,[3] and reverberations of the meeting are still being heard.

The automobile of one William H. Rye struck and killed a small lad. The father of the child qualified as administrator of his estate and brought suit in circuit court under the wrongful death statute. The defendant Rye was allowed by the lower court to testify, over the objection of the plaintiff. The objection was based upon the ground that the defendant was incompetent to testify in his own defense under the rule of the dead man statute. The question to be decided on appeal was whether the surviving motorist defendant was competent to testify in defense of a suit brought against him by the administrator under the wrongful death statute.

The court held that the testimony was competent, but the decision was challenged by a vigorous, lucid, and well-reasoned dissent, written by Justice Lee and joined in by Justices Hall and Arrington.

The majority reached its decision by the following reason: The suit was not an action involving an *estate,* and since no *estate* was involved in the suit, the prohibitions of the dead man statute were not applicable. The court applied the definition of *estate* set out in *Jacks v. Bridewell,*[4] and the definition of *directness* contained in *Fennell, Adm'x v. McGowan.*[5]

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[1]MISS. CODE ANN. § 1453 (1956).

[2]MISS. CODE ANN. § 1690 (1956).

[3]Hawkins, Adm'r v. Rye, 233 Miss. 132, 101 So. 2d 516 (1958).

[4]51 Miss. 881 (1876).

[5]58 Miss. 261 (1880).

Working with the word *estate*, the court relied heavily on the case of *Mississippi Power Co. v. Archibald*,[6] to aid it in reaching the conclusion that an *estate* was not involved. In the *Archibald* case it was held that the administrator of an estate is not a necessary party when he is suing for the real use and benefit of specified heirs or family beneficiaries of a deceased. Because the administrator was representing certain members of a family and not the estate, he was not a necessary party.

The court also relied upon the fact that the wrongful death statute created an entirely new and distinct cause of action in favor of designated persons. The administrator, representing the class of persons set forth in the wrongful death statute, was not representing an *estate*, and therefore the dead man statute could not be invoked against the defendant Rye to exclude his testimony.

The dissent strongly intimated that the solution reached by the majority was not as simple as it sounded, and really created more problems than it solved:

> Under the majority view, holding the testimony of the defendant admissible in this case, the jurisprudence of this State will now sanction this result: Two motorists, married, with two children each, in separate automobiles, have a headon collision in which one of them is killed and the other is seriously but not fatally injured. The survivor sues the *estate* of the decedent to recover damages on account of the alleged negligence of the decedent. Under Cross v. Frost, and Reynolds v. Snowden, supra, he cannot testify. On the contrary, if the estate of the decedent sues the survivor to recover for the alleged wrongful death, such survivor may testify because the administrator, in that suit, would be acting simply for the widow and children, who are living persons. Thus the survivor, in the first instance, cannot testify because both of the parties to the transaction "are dead, one through natural causes, the other by legislative enactment." Jacks v. Bridewell, supra. But, in the second instance, that salutary rule has no application. Its efficacy cannot be invoked.[7]

The dissent reasoned as follows: (1) The alleged wrongful act of the defendant originated during the lifetime of the deceased. (2) The rule of *Griffin v. Lower*,[8] reaffirmed in *Lamar v. Williams*,[9] *Witherspoon v. Blewett*,[10] and *Jacks v. Bridewell*,[11] ought to be followed, and that rule, stated briefly, is that an action in which the *representative* of a decedent's estate is a party, the living party is not competent to testify. (3) The holding of the majority discards the long established

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[6]189 Miss. 332, 196 So. 760 (1940).

[7]Hawkins, Adm'r v. Rye, 233 Miss. 132, 154, 101 So. 2d 516, 526 (1958).

[8]39 Miss. 458 (1859).

[9]39 Miss. 342 (1860).

[10]47 Miss. 570 (1873).

[11]51 Miss. 881 (1876).

purpose of the dead man statute, and in effect overrules *Shepard v. Johnson*, wherein it was said:

> Section 1690, Code 1942, prohibiting a person from testifying as a witness to establish his own claim against the estate of a deceased person, created an exception to the general rule as to the competency of a witness; and being an exception, *it must be strictly construed in favor of the competency of the witness.* . . . The exception must come within *both the letter and the spirit of the statute.*[12]

The dead man statute has as its purpose the exclusion of testimony by a surviving litigant in prosecution or defense of a claim. If it is interpreted literally or liberally, it will cause and has caused the defeat of many honest claims and defenses and will and does find itself in direct conflict with not only the wrongful death statute but also the general principle of evidence that doubt is always resolved in favor of the competency of testimony.[13]

For these reasons alone the decision in *Hawkins, Adm'r v. Rye* serves as a guide for future litigants and lower courts in death actions. But the decision will not quell the hue and the cry for and against the dead man statute. Both the logic of the majority opinion in that case and the forcefulness of the dissent therein precludes such a probability.

It may be that there is good and sufficient reason for the dead man statute, but even as long ago as 1904, strong words in condemnation were levied against it:

> There never was and never will be an exclusion on the score of interest which can be defended as either logically or practically sound. Add to this the labyrinthine distinctions created in the application of the complicated statutes defining this rule; and the result is a mass of vain quiddities which have not the slightest relation to the testimonial trustworthiness of the witness. . . . As a matter of policy, this survival of a part of the now discarded interest-qualification is now deplorable in every respect; for it is based on a fallacious and exploded principle, it leads to as much or more false decision than it prevents, and it encumbers the profession with a profuse mass of barren quibbles over the interpretation of mere words.[14]

It is predicted that other similar cases will come before the court, and the court will use either a "strict" interpretation or a "liberal" interpretation of the dead man statute, depending upon which interpretation seems to bring equity into the case to "do what should be done."

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[12]201 Miss. 99, 106, 28 So. 2d 661, 663 (1947) (Emphasis added.)

[13]See, *e.g.*, Shepard v. Johnson, 201 Miss. 99, 28 So. 2d 661 (1947).

[14]1 WIGMORE, EVIDENCE § 578 (3d ed. 1940).

Mississippi Law Journal

JOURNAL of the MISSISSIPPI STATE BAR
MEMBER, NATIONAL CONFERENCE OF LAW REVIEWS
MEMBER OF SOUTHERN LAW REVIEW CONFERENCE

VOLUME XXXIII DECEMBER 1961 NUMBER 1

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Student Comments

DESCRIPTIONS AND TAX TITLES

I. Introduction

Defective tax titles in Mississippi have produced a considerable volume of litigation and legislation.[1] Frequent and successful attacks on their integrity have made tax titles objects of suspicion with which only speculators will deal. Their marketability is drastically reduced, and rarely do they bring more than taxes and costs at a tax sale. As a consequence the state is deprived of the increased revenue and intangible advantages which would accrue through improvement and development of the lands by purchasers secure in their ownership.[2]

The question of the sufficiency of land descriptions has been a principal source of controversy in the law of tax titles. Remedial legislation has been enacted,[3] and numerous descriptions have been litigated.[4] Nevertheless, one seeking guidance in assessing the sufficiency of a tax title description is likely to find only confusion, inconsistency, and uncertainty.

This situation can be attributed in part, it seems, to a failure fully to appreciate the unique character of a tax deed. This has led to faulty analysis of the problem and to the application of inappropriate rules of construction. Although the proper result is frequently reached, the reasoning in many of the decisions serves as a pitfall rather than a guide post in subsequent cases.

The authorities are agreed that there is a material distinction between a tax deed and a voluntary conveyance,[5] and even between a tax sale and other kinds of forced sales.[6] A tax sale differs from a sheriff's sale in that the tax collector derives his power from the taxing statutes whereas the sheriff sells under the authority of a judgment and execution.[7] The tax collector exercises a power "derived exclusively and directly from a statute, without any other agency, or the action of any tribunal" and hence the statute must be strictly pursued.[8]

The difference between a tax sale and a voluntary sale is this and something more. Involuntary alienations were contrary to the public policy of the feudal system, and a power of sale in a stranger to the

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[1] See generally Moody, Tax Title Laws of Mississippi (1905).

[2] See Clark, *Tax Titles In Mississippi*, 17 Miss. L. J. 372 (1946).

[3] *E.g.*, Miss. Code Ann. § 9775 (1956).

[4] Extensive research has revealed eighty-two cases, all of which are here collected, involving tax title descriptions.

[5] See, *e.g.*, 3 Cooley, Taxation § 1175 (4th ed. 1924). *But see* Simmons v. State, 199 Miss. 271, 274, 24 So. 2d 660 (1946) (Roberds, J.) (the distinction is not well taken).

[6] See, *e.g.*, Helm v. Natchez Ins. Co., 16 Miss. 197 (1847).

[7] *Ibid.*

[8] The President and Selectmen of Natchez v. Minor, 18 Miss. 247, 257 (1848) (Sharkey, J.).

estate was always a naked power.[9] The common law rule was that, "in the case of a naked power not coupled with an interest, the law requires that every prerequisite to the exercise of that power must precede its exercise."[10] Another reason assigned for strict adherence to the statute is that the owner is divested of his title for breach of the tax laws, and the presumption is that he has violated no law. Therefore, he waives no rights by silence and may insist upon strict observance of the law by the taxing authorities in the execution of the power.[11] Again it is said the proceedings are always summary and a departure from the course of the common law in judicial proceedings, or that the statute conferring the power is itself in derogation of the common law and should not be extended further than absolutely required.[12] Laying aside the reasons, however, the rule seems always to have been that stricter observance of form is required in this class of conveyances than in the case of either voluntary alienations or other kinds of involuntary conveyances.

The distinction between a tax sale and a voluntary conveyance assumes greater significance where the description is involved. One of the essentials of a valid deed is a description sufficient to identify the object upon which the deed is to operate.[13] Since nothing passes by a deed but that described therein,[14] a tax deed must contain a proper description so that the purchaser may acquire a good title.[15] In private conveyances the general rule is that the intention of the parties, as gathered from the deed, is the criterion in determining the object of the grant, and the instrument is construed most favorably to the grantee.[16] In a deed between individuals the question is what the owner intended to convey; in a tax deed the owner conveys nothing and does not intend to convey anything. Thus in a tax deed, words necessary to identify the land "will not be supplied by intendment, nor will any part of the description be rejected as surplusage."[17] Therefore there is a distinction between tax deeds and private deeds in that in the one intention is controlling and in the other it can have no consequence whatsoever.[18]

Furthermore, where the conveyance is for taxes and without the

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[9] BLACKWELL, TAX TITLES 34-6 (6th ed. 1875).

[10] Hodge v. Wilson, 20 Miss. 498, 505 (1849) (Clayton, J.).

[11] BLACKWELL, *op. cit. supra* note 9, at 46.

[12] *Id.* at 47.

[13] See, *e.g.*, 3 WASHBURN, REAL PROPERTY 331 (3rd ed. 1868).

[14] 1 JONES, REAL PROPERTY AND CONVEYANCING § 325 (1896).

[15] BLACK, TAX TITLES § 112 (2d ed. 1893).

[16] See, *e.g.*, 3 AMERICAN LAW OF PROPERTY § 12.115 (1952).

[17] BLACK, *op. cit. supra* note 15, § 406; see McQueen v. Bush, 76 Miss. 283, 24 So. 196 (1898).

[18] See Sims v. Warren, 68 Miss. 447 (1890).

owner's consent, the description must be adequate to notify the owner of the claim against his property.[19] This is one of the elements of due process.[20] This requirement, of course, appertains to the description on the assessment roll rather than that in the deed, but the descriptions should correspond,[21] and a defective description on the roll cannot be corrected in the deed.[22] Therefore, what is said of one may be said of the other. This raises a second distinction between tax deeds and private conveyances; the description in the tax deed must be sufficient to give the owner notice of the land claimed that he may not be deprived of his property without due process of law, while no such precaution is necessary in voluntary conveyances.

Thus, as an initial proposition, it may be stated that greater precision is required of a description in a tax deed than in other deeds,[23] although certainty beyond all doubt is not required and a description reasonably certain is sufficient.[24] Aside from this generalization, however, it is impossible to lay down any general rules by which the sufficiency of a particular description may be measured.[25] Consequently, it is the cases and not the authorities which must be examined to determine what is required of a tax deed description.

II. Omission of County and State

The first case to raise the question of the certainty of the description in a tax deed appears to have been that of *Hanna v. Renfro*,[26] wherein the admission of the tax deed into evidence was objected to on the ground that the omission of the state and county from a description containing the proper section, township, and range rendered the deed fatally uncertain. The Mississippi Supreme Court brushed aside the objection with the observation that the omission "was but a latent ambiguity which was susceptible of explanation,"[27] and that the evidence fully established the identity of the premises with those sued for.

In deference to the past, a moment's consideration should be given to the classification of the omission of the state and county as a latent ambiguity before passing on to the present significance of the case. The authorities current with the case[28] were agreed that a latent ambiguity arose where a writing clear and certain on its face was rendered un-

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[19]3 Cooley, *op. cit. supra* note 5, § 1175.

[20]Carr v. Barton, 173 Miss. 662, 162 So. 172 (1935).

[21]Boone v. Dulion, 80 Miss. 584, 587, 32 So. 1, 2 (1903); see Reed v. Heard, 102 Miss. 28, 58 So. 706 (1912).

[22]Gibbs v. Hall, 38 So. 369 (Miss. 1905).

[23]3 Devlin, Real Estate § 405 (3rd ed. 1911).

[24]Tamburo v. Standard Oil Co., 164 Miss. 386, 145 So. 107 (1932).

[25]4 Tiffany, Real Property § 997 (3rd ed. 1939).

[26]32 Miss. 125 (1856).

[27]*Id.* at 128.

[28]See, *e.g.*, 1 Greenleaf, Evidence §§ 297-300 (Redfield ed. 1861).

certain by the addition of some fact not apparent from the writing itself, as where one conveyed his farm *X* and it was proved he had two farms called *X*. In such a case it was said the uncertainty could be removed by extrinsic evidence of what the grantor intended to convey, or, more precisely, what meaning the grantor attached to the words used.[29] On the other hand, a patent ambiguity existed where a mere perusal of the instrument showed that something more must be added before it could be determined what was intended to pass by the deed, as where one conveyed 120 acres out of *X* farm.[30] In such an instance extrinsic evidence was inadmissible to show which 120 acres was intended.

Nevertheless, in the case of both latent and patent ambiguities it was not all extrinsic evidence but only evidence of intention that was excluded, and the circumstances surrounding the transactions were a permissible area of inquiry.[31] The reason for this rule was to prevent the unexpressed intention of the grantor from contradicting the expressed intention of the deed while allowing the court to look to the situation of the parties in fixing the meaning of the words used in the writing. Once the meaning of the words was fixed, the intention they expressed was conclusive and proof of a contrary intention was inadmissible.[32] If, however, the meaning cannot be ascertained from the words and circumstances then neither can the intention, and the instrument is void.[33] It should be observed that it is still the intention of the parties which is sought, but the search must be confined to the intention expressed in the writing.

What then is the significance of the distinction between latent and patent ambiguities? Where the ambiguity is latent, evidence of intention *is* admissible. The reason given is that where the words are equivocal and describe two things when one was meant, the proof of intention is not competing with meaning of the instrument. The words may be interpreted with greater freedom since there is no danger of the extrinsic evidence overturning the terms of the instrument.[34]

The problem, however, it not to define the rule, but to fit a given ambiguity into its proper category. As to whether or not an omission constitutes a latent or a patent ambiguity, the courts are divided[35] and the Mississippi decisions are in conflict.[36]

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[29]See 9 WIGMORE, EVIDENCE § 2459 (3rd ed. 1940).

[30]See 3 PHILLIPS, EVIDENCE §§ 1356-60 (2d ed. 1843).

[31]See 1 GREENLEAF, *op. cit. supra* note 28, §§ 297-300.

[32]See 9 WIGMORE, *op. cit. supra* note 29, § 2459.

[33]1 GREENLEAF, *op. cit. supra* note 28, § 300.

[34]See 9 WIGMORE, *op. cit. supra* note 29, § 2472.

[35]See 32 C. J. S. *Evidence* § 961d (2) (1942).

[36]*Compare* Haughton v. Sartor, 71 Miss. 357, 15 So. 71 (1894), *overruling* Foute v. Fairman, 48 Miss. 536 (1873), *with* Ladnier v. Ladnier, 75 Miss. 777, 23 So. 430 (1898).

The *omission* was not *introduced* by extrinsic evidence, and it seems rather strained to say it is a latent ambiguity.[37] Since the omission appears on the face of the instrument it would seem the ambiguity is patent. But this conclusion takes into account only half of the rule, for it must also appear from the face of the instrument that "something more must be added before the thing intended to be conveyed can be determined." This observation points to the present significance of *Hanna v. Renfro.*

If the county and state are essential to make a description certain, the omission thereof is clearly fatal. In a tax deed the omission cannot be supplied by proof of intention, which is the purpose of extrinsic evidence, because the party to be bound by such intention, if proved, was not a party to the transaction. Moreover, if the omission of the county and state renders the description uncertain, there is no notice, and consequently there is a denial of due process. Therefore, the true rule of *Hanna v. Renfro* is not that latent ambiguities in tax deeds may be cured by parol, but that the county and state are *not essential* to a valid description where the land is identifiable without them. When land is described according to the system of the public land surveys of the United States, the description is sufficient though the county and state are omitted, for judicial notice is taken of such surveys.[38] The description is sufficiently certain as it stands.

The court later repudiated this line of reasoning when, on identical facts, it recognized that the deed did "not present any ambiguity at all."[39] But again the court failed to assert the most obvious grounds for its holding. It relied instead on the presumption that the tax collector performed his official duty, which was to sell lands only in the county for which he was the collector.

On the other hand, a description which omits the section number is no description at all and is void.[41] The same is true where the section number[42] or the township[43] is incorrect. The description cannot be applied to the proper land, and since the error can neither be corrected nor rejected, the description is insufficient.

Nevertheless, it has been held that in view of the statute prescrib-

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[37]For a discussion of blanks see 9 WIGMORE, *op. cit. supra* note 29, § 2473.

[38]CLARK, SURVEYING AND BOUNDARIES § 451 (3rd ed. 1959).

[39]Lewis v. Seibles, 65 Miss. 251, 255, 3 So. 652, 653 (1887).

[40]*Id.* at 256, 3 So. at 653.

[41]Wing v. Minor, 7 So. 347 (Miss. 1890); *accord,* Brulie v. Cooney, 12 So. 463 (Miss. 1893).

[42]McQueen v. Bush, 76 Miss. 238, 24 So. 196 (1898).

[43]Crawford v. McLaurin, 83 Miss 265, 35 So. 209, *suggestion of error overruled,* 83 Miss. 278, 35 So. 949 (1904).

ing the manner in which the land rolls are to be made up,[44] the omission of the section, township, and range from succeeding lines of the assessment roll, where they are given at the beginning of the assessment of each section, does not vitiate the assessments.[45]

III. Part of a Larger Tract

A. A Part of Section 18, in Township 7, of Range 2, East, Containing 180 Acres

A description which states that the property is part of a larger tract—as distinguished from a specified quantity out of a larger tract[46]—but does not clearly identify the part intended, is so inadequate as to render the assessment a nullity. Not only is such a description inadequate to inform the owner of the taxing of his land, but a deed to a part of a tract conveys no legal title to any portion of the tract.[47] Failure to observe this fundamental rule has been the undoing of many a tax deed and the cause of much learned, but inapposite, discussion of latent and patent ambiguities.

It all seems to have begun with *Brown v. Guice*[48] which is the more amazing since this was a time when the "rules of Lord Bacon are less regarded of late than they were formerly."[49] The description in that case was, "a part of section 18, in township 7, of range 2, east, containing one hundred and eighty acres." The description is quite obviously void since it does not identify a specific hundred and eighty acres in the section. The court, however, did not hold that the description was void because it was uncertain; the court held the description void because it contained a patent ambiguity which could not be aided by parol evidence.

Admittedly, the ambiguity is patent and the authorities are all to the effect that an unidentified portion of a larger tract cannot be located by parol.[50] Nevertheless, such reasoning indicates that the patent ambiguity rule is applicable, which, if correct, would lead to the introduction of extrinsic evidence to explain the *meaning* of the terms if not the intention of the parties.

The nature of a tax deed forbids such an approach. The words of any written instrument must be given their ordinary meaning, but

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[44]Miss. Code Ann. § 9772 (1956)

[45]Miller v. Fulliwiley, 192 Miss. 846, 7 So. 2d 799 (1942).

[46]See note 131 *infra* and accompanying text.

[47]Black, *op. cit. supra* note 15, § 115.

[48]46 Miss. 299 (1872).

[49]Peacher v. Strauss, 47 Miss. 353, 366 (1872).

[50]See, *e.g.*, 1 Jones, *op. cit. supra* note 14, § 337. *But cf.* Harris v. Byers, 112 Miss. 651, 73 So. 614 (1917).

such meaning is only prima facie correct and may be overturned by showing that the individual parties gave them a different meaning.[51] In a tax deed, however, the ordinary meaning must be conclusive because the tax collector acted alone and never mutually agreed with the owner to give the words a different meaning. Therefore, if the words are given their accepted meaning and the identity of the thing conveyed remains uncertain, the deed is void and that is the end of it.

B. Fourteen Acres off Northeast Corner East Half, Southeast Quarter, Section 20. Thirteen Acres off North End, West Quarter, Southwest Quarter, Lying North of Road, Section 21.

It seems to be generally accepted that when a specific part of a larger tract is designated by quantity, and its form is not specified, it will be set off on the appropriate side line of the larger tract as an oblong rectangle, if located at one side, or as a square, if located in a corner.[52]

No explanation for the rule has been found, but it seems to have been transmitted into the Mississippi law via an early Ohio case[53] relied on in upholding the above descriptions. The Ohio court had before it a sheriff's deed which described the land as seventy acres in the southwest corner of a designated quarter section. The premises in fact commenced in the southwest corner and extended on the west line to the northwest corner in an oblong square containing seventy acres. The defendant contended the description was void for uncertainty, and the plaintiff argued that the description was good to convey the seventy acres on the west side. "Neither of these constructions can be maintained," said the court. The court said further:

> It is argued . . . that the court, in performing in this case the functions of a jury, are to decide not only the *construction* of the deed but the intention of the parties. Where there is no ambiguity in the description the construction of the terms employed is a matter of law, independent of the intention of the parties. And here, upon legal principles, there is no ambiguity. Had the description been 'seventy acres on the west side of the quarter,' the whole west line must have been considered the base line of the tract, and the quantity laid out in an oblong square. It would have been a violation of the plain legal sense of the terms used, to lay the land out in a square at the southwest corner, upon parol proof that such was the intention of the parties. So, in this case, no proof can justify us in giving an interpretation, by which terms, that locate the land in a square at the southwest corner, shall be made to

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[51] 9 WIGMORE, *op. cit. supra* note 29, §§ 2460, 2465.

[52] See, *e.g.*, 1 PATTON, TITLES § 146 (2d ed. 1957). *But see* CLARK, *op. cit. supra* note 38, § 476.

[53] Walsh v. Ringer, 2 Ohio 327 (1826).

> locate it on the west side. The plaintiff must have judgment for so much of the land in dispute, as may be included by a line, north from the southwest corner, such distance that parallel lines of a square with four equal sides will include seventy acres.[54]

The opinion is set out at length to emphasize the fact that where a description is sufficient on its face, as a matter of law, it neither requires nor admits of aid by way of parol. The opinion holds that a description as a specified quantity in a corner is sufficiently certain in itself. That the Mississippi court fully accepted the rationale of the Ohio case is disclosed by its opinion sustaining the descriptions, "14 A's off N. E. cor." and "13 A's off N. end," wherein it said:

> We consider the description certain enough. It is easy to lay thirteen acres off the end of an eighth of a section, and fourteen acres of the northeast corner of an eighty. . . . The southern and western boundaries only are to be established by construction, and the rule referred to gives them with sufficient certainty.[55]

Neither court, however, explains why the words "14 A's off N. E. cor." is equivalent to saying "14 A's in the form of a square in the N. E. cor." There is an infinite number of shapes fourteen acres could assume and still be in the corner. Nevertheless, if this is the conclusive meaning of the words, then they meant the same thing to the tax collector. If so, then he assessed fourteen acres in a square in the corner, part of which was the defendant's and part of which was not.

A joint assessment and valuation was made of property separately owned, and hence created "no lien for the whole or any part of such tax; and no apportionment of the tax will create a lien unless made as a formal reassessment of the separate parcel."[56] This rule has been rejected by statute in Mississippi,[57] but the law at the time the instant case was decided was that land could be redeemed only by paying "the whole amount of tax for which such land was sold."[58] Consequently, in order to avoid the sale of so much of his land as was included in the joint assessment, the owner would be forced to pay the taxes on the other lands within the square. Therefore, while the decision would be correct under the present statutes, it was clearly contrary to the law at the time.

In view of the court's interpretation of section 9775 of the code,[59]

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[54] *Id.* at 333.

[55] Bowers v. Chambers, 53 Miss. 259, 267 (1876).

[56] BLACK, *op. cit. supra* note 15, § 102.

[57] MISS. CODE § 561 (1880) (now MISS. CODE ANN. § 9948 (1956)); see Moores v. Thomas, 95 Miss. 644, 48 So. 1025 (1909).

[58] MISS. CODE § 1701 (1871).

[59] MISS. CODE ANN. (1956).

however, this problem has been almost completely obviated. It is no longer necessary to supply an artificial boundary by construction; the true boundaries may now be established by reference to the deed records.[60]

In the evolutionary process, however, the following descriptions of a part of a larger tract or lot have been held insufficient to support an assessment or sale for taxes: part of lot 285, sq. 59, Vicksburg proper;[61] Bal. fractl. section 11, township 5 range 12, 522 acres;[62] part of S.E. ¼ of sec. 5, township 14, range 4 east;[63] balance of section 8, township 12, range 17, west;[64] part of lots 19, 20, and 21 in square B, J. W. Walker's survey;[65] part of Deer park, 120 acres;[66] Pt. Sec. 28 Tp. 12 R. 3E, 5 acres;[67] part of Hoggatt Tract.[68]

On the other hand, the following descriptions of a specified part of a greater tract have been held sufficient in tax sales: Fr'l. N ¼ of section 14;[69] fractional section 11;[70] E. p't S.W. ¼, sec. 38, T. 1, R. 1 W—20 acres;[71] South part of section 5, township 14, range 4 east, containing about 225 acres;[72] west part section 7, township 7, range 2—300 acres;[73] east half west of Bowie, section 32, township 5 north, range 13 west;[74] W. ½ X N. W. ¼ — S. E. ¼ X N. W. ¼;[75] south part of section 29, township 3, range 11, eighty acres;[76] S. Fr. S. E. ¼ 33 acres;[77] All N ½ lying W. of Clear Creek S. 13, T. 19, R 7;[78] 7.64 A. NE Cor. Sec. 11 Town. 6 Range 1 W;[79] 77 acres north part Section 48, Twp. 1, Range 3.[80]

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[60]Loper v. Hinds Land Co., 214 Miss. 644, 58 So. 2d 88, *modified on suggestion of error,* 214 Miss. 657, 59 So. 2d 326 (1952).

[61]Cogburn v. Hunt, 54 Miss. 675 (1877).

[62]Selden v. Coffee, 55 Miss. 41 (1877).

[63]Tierney v. Brown, 65 Miss. 563, 5 So. 104 (1888).

[64]Pearce v. Perkins, 70 Miss. 276, 12 So. 205 (1892).

[65]Hughes v. Thomas, 29 So. 74 (Miss. 1900).

[66]Ransom v. Young, 176 Miss. 194, 168 So. 473 (1936).

[67]Meyerkort v. Warrington, 19 So. 2d 433, *opinion withdrawn,* 20 So. 2d 708 (Miss. 1945).

[68]Thompson v. Wherry, 27 So. 2d 771 (Miss. 1946).

[69]Selden v. Coffee, 55 Miss. 41, 45 (1877) (equivalent to N½ of fractional section 14). Compare Lott v. Rouse, 147 Miss. 802, 111 So. 838 (1927).

[70]*Id.* at 45 (dictum).

[71]McCready v. Lansdale, 58 Miss. 877 (1881).

[72]Tierney v. Brown, 65 Miss. 563, 5 So. 104 (1888).

[73]Herring v. Moses, 71 Miss. 620, 14 So. 437 (1894).

[74]Mixon v. Clevenger, 74 Miss. 67, 20 So. 148 (1896).

[75]Moores v. Thomas, 95 Miss. 644, 48 So. 1025 (1909) (X shown to be common abbreviation for of on roll).

[76]Webb v. Mobile & Ohio R. R. Co., 105 Miss. 175, 62 So. 168 (1913).

[77]Woods v. Linder, 194 Miss. 226, 11 So. 2d 900 (1943).

[78]McNatt v. Hyman, 204 Miss. 824, 38 So. 2d 107 (1948).

[79]Loper v. Hinds Land Co., 214 Miss. 644, 58 So. 2d 88, *modified on suggestion of error,* 214 Miss. 657, 59 So. 2d 326 (1952).

[80]DeLee v. Anderson, 216 Miss. 888, 63 So. 2d 393 (1953).

IV. Name of Tract or Owner

A. Lot and Residence in Madison Station, for Taxes Assessed to the Reputed Owner Thereof, Thomas McMahon

Although the above description was declared void because patently ambiguous,[81] the decision reveals an incipient understanding of the nature of a tax deed. At least oblique recognition is given to the distinction between tax deeds and other deeds by the conflicting reasoning in the case. While the whole decision is couched in terms of latent and patent ambiguities, it is said at one place that, "the deed of a tax collector who sells *in invitum*, by virtue of power conferred by law, must in itself be sufficient to convey the thing sold."[82] After declaring the primary question to be whether the ambiguity is latent or patent, it is stated that, "in the determination of this primary and fundamental question the court can neither know, nor inquire into, the situation or intention of the parties."[83] Again it is laid down that:

> The question, therefore, of what was the intention or the situation of the parties or of the property can never be inquired into if a perusal of the document in question, and a reference to all the other documents or circumstances referred to by it, leaves a palpable uncertainty as to what has been conveyed.[84]

Such reasoning cannot be reconciled with the latent and patent ambiguity rule which the court purports to discuss.[85] To give the language of the opinion any effect at all, it must be limited to the facts of the case. When so limited, a wholly new rule emerges from the case—in the interpretation of tax deeds, extrinsic evidence inadmissible to establish intention *or* meaning. The rule thus stated has nothing to do with latent and patent ambiguities. It deals solely with the question of certainty. Compendiously, if the terms of a tax deed description are given their ordinary meaning and yet leave in doubt the thing conveyed, the description is uncertain and the deed is void.

The only basis on which the description could be sustained is that the property is sufficiently described by the name of the owner and all that remains is to apply the description. Identification by the owner's name is a recognized method of description,[86] and, indeed, is sanctioned by the legislature as one method of assessing lands for taxes.[87] As a matter of law, a description by the name of the owner is as certain as one by metes and bounds or by governmental survey and requires no extrinsic evidence to perfect it.

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[81] Bower v. Andrews, 52 Miss. 596 (1876).
[82] *Id.* at 602 (Simrall, C. J., concurring).
[83] *Id.* at 604 (Chalmers, J., concurring).
[84] *Ibid.*
[85] See 1 Greenleaf, *op. cit. supra* note 28, § 300.
[86] See, *e.g.*, 1 Jones, *op. cit. supra* note 14, § 348.
[87] Miss. Code Ann. § 9773 (1956).

If the description is valid on its face then parol evidence is admissible to *apply* the description to the parcel conveyed. Such evidence cannot be used to enlarge the scope of the descriptive words, but only to fit them to the land intended to be described. The deed itself, however, must point to the source of the evidence aliunde, and this is accomplished by the use of the name of the owner.[88] This rule is applicable to tax deeds as well as ordinary conveyances,[89] and there is no reason why it should not be. It does no violence to the reason for the distinction between voluntary and involuntary alienations. The description is sufficient to pass title, the owner certainly has notice, and the evidence is not admitted to show meaning or intention.

The initial question is whether, as a matter of law, the description is sufficiently certain on its face to identify a particular tract of land and to give the owner notice. If so, the description is valid and extrinsic evidence is admissible to apply it. If not, the description is void and no evidence is admissible for any purpose.

Although the authorities appear to be the other way,[90] it seems, as a matter of logic, that should the extrinsic evidence disclose a latent ambiguity, as where the owner had two lots and residences, the description ought then be declared void. Otherwise it would require looking into the intention of the tax collector, which cannot be allowed.

It will be recalled, however, that the description under consideration does not identify the property as the "lot and residence of Thomas McMahon" or even as the "lot and residence of the reputed owner, Thomas McMahon," both of which would have been valid.[91] Rather, the description reads, "lot and residence in Madison Station, for the taxes assessed to the reputed owner thereof, Thomas McMahon." The court held that the words following Madison Station "are not descriptive of the thing sold, but expressive of the reason for the sale."[92] If these words are subtracted from the description, all that is left is "lot and residence in Madison Station" which is clearly an uncertain description. Although logically sound, such a construction does seem somewhat artificial and reveals a rather undue regard for mere form.

B. Commencement Plantation, Consisting of 500 Acres, Situated in Adams County in the State of Mississippi

A similar situation arises where land is described by a name by which it is well known. The designation of a tract by its commonly

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884 THOMPSON, REAL PROPERTY § 3090 (1924).

8912 ENCYCLOPAEDIA OF EVIDENCE, TAXATION 302 (1908).

90See *e.g.*, BLACK, *op. cit. supra* note 15, § 407; *cf.* Freeman v. Adams, 207 Miss. 760, 43 So. 2d 362 (1949). *But see* CLARK, *op. cit. supra* note 38, § 439.

91Bowers v. Andrews, 52 Miss. 596, 605, 607 (1876) (dictum).

92*Id.* at 607.

known name may constitute an adequate description except when more than one tract is known by the same name.[93] Furthermore, the legislature has expressly provided that such a description shall be sufficient in tax titles.[94] To describe land by its common designation is to describe it by reference to an extrinsic fact. It is comparable to a reference to a governmental survey or a plat or deed and is equally adequate.[95]

Consequently, the description "Commencement Plantation consisting of 500 acres" is sufficient on its face. All that need be done is to apply the description to the land by the aid of extrinsic evidence. If in applying the description, it appears that Commencement Plantation consists of 1,330 acres rather than five hundred, then there is no way to locate the particular five hundred acres and the deed is void.[96]

This result would not necessarily obtain in a voluntary conveyance between individuals. The case would be one merely of conflicting descriptions and the subordinate one would be rejected by construction. As between the two, a description by quantity must give way to a designation by name.[97] If no part of a description can be rejected as surplusage,[98] there is no way to resolve the conflict in a tax deed. The deed is affected with a fatal uncertainty which renders it void.

C. (Known as A. J. Welsh Lot)

Where the property is expressly referred to by its well known name the description is sufficient.[99] It appears also that the court has relaxed the rule against treating any part of a tax title description as surplusage. It will now reject an erroneous metes and bounds description in order to give effect to a description by name,[100] which is in accordance with the rule in private conveyances.[101]

The above description appeared parenthetically in a false metes and bounds description on the assessment roll. Whether the description was sufficient in itself under section 9773 of the code,[102] or was a "clue" under section 9775,[103] is not altogether clear from the opinion. Nevertheless, the substance and effect is the same in either case.

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[93]CLARK, *op. cit. supra* note 38, § 439.

[94]MISS. CODE ANN. § 9773 (1956).

[95]See 3 AMERICAN LAW OF PROPERTY § 12.104 (1952).

[96]Vaughan v. Swayzie, 56 Miss. 705 (1879).

[97]3 AMERICAN LAW OF PROPERTY § 12.120 (1952). Compare Dochterman v. Marshall, 92 Miss. 747, 755, 46 So. 542, 543 (1908).

[98]BLACK, *op. cit. supra* note 15, § 406.

[99]See Stockstill v. Bennett, 215 Miss. 417, 61 So. 2d 154 (1952).

[100]See *ibid.*

[101]6 POWELL, REAL PROPERTY ¶ 890 (1958).

[102]MISS. CODE ANN. (1956).

[103]*Ibid.*

V. STATUTES

A. *Miss. Code Ann.* §§ 9773, 9774 (1956)

In the Code of 1880 there first appeared two sections[104] which, although slow to gain acceptance, have since been developed into a strong support for tax title descriptions. The two provisions have been brought forward with every revision of the code and presently appear as sections 9773 and 9775,[105] by which designation they will hereafter be referred to regardless of the code applicable.

> § 9773. Requirements directory. — A failure to observe the requirements of the last preceding section [§ 9772. How land roll made up.] shall not vitiate any assessment, if the land be so described as to be identified; and it shall be sufficient identification of the land to describe it as the land of . . . (the person owning or claiming it), occupied by . . . ; or that part of (section or other known division designating it) owned or claimed by . . .; or the lot on which . . . resides; or the lot occupied by . . . ; or by the name by which it may be known; or by any description which will furnish a sure guide for the ascertainment by parol evidence of the particular land intended.
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> § 9775. Description of land. — [1] In assessing land, a description of it as a part of a designated tract or division, shall be held to embrace such part as is the subject of separate ownership, as one tract or division, whether owned by one or several jointly; [2] and when part of a designated tract or division shall be sold for taxes, the sale shall pass the title of such part as was the subject of such separate ownership when it was assessed; [3] and the sale of a specified number of acres of a tract containing more, or a specified portion of a tract, shall pass an undivided interest in the whole tract equal to the proportion which the number of acres or portions sold bears to the whole tract; [4] and when part of a known tract or division of land is assessed by a description which identifies it, any other part of it which is assessed but not so identified, shall be held to embrace all of such tract or division not included in the part identified; [5] and parol testimony shall always be admissible to apply a description of land on the assessment roll, or in a conveyance for taxes, which such testimony will show what land was assessed and sold, and there is enough in the description on the roll or conveyance to be applied to a particular tract of land by the aid of such testimony.

B. Lot Two, and Parts of Lots One and Three, Square Three, Haley Plat, in Hazlehurst, Section 3, Township 10, Range 3 East, Assessed to I. V. Ellis

Dodds v. Marx[106] appears to be the first decision in which the

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[104] §§ 490-91.

[105] MISS. CODE ANN. (1956).

[106] 63 Miss. 443 (1886).

statutes were applied. Marx purchased the land from Ellis and paid the taxes on it under the above description. However, the land was also assessed as "Lot two and thirteen feet off north side lot three, square three . . . assessed to A. Cohn," who was Ellis' vendor. The property was sold for taxes unpaid under the second description and purchased by Dodds, who brought an action of ejectment against Marx.

In order to hold that the payment by Marx defeated the sale to Dodds, the court seemed to feel a necessity for finding that payment was made under a valid assessment.[107] The description was sustained on the ground that "it could be applied by the aid of parol evidence to lot two and thirteen feet off of lot three."[108]

In reaching this conclusion, the court said of the first clause of section 9775 that where only a part of a lot is owned by one the remainder is necessarily the subject of separate ownership, but:

> it is only where the assessment roll *shows the owner* of the part meant *or contains some other sufficient indication* that the provision of the statute can apply. Part of a designated division of land being assessed to him who owns a part of it, the law applies the description to the fact of ownership, and makes that definite and certain which but for the statute would be void for uncertainty. The roll must furnish the clue, which when followed by the aid of parol testimony, conducts certainly to the land intended.[109] (Emphasis added.)

The last clause of section 9775 provides that "parol testimony shall always be admissible to apply a description . . . and there is enough in the description on the roll or in the conveyance to be applied to a particular tract of land . . . ." Neither before[110] nor after[111] the statute was a mere designation of "part" of a lot or tract ever a sufficient description. It is "no description whatever."[112] If there is no description whatever "on the roll or in the conveyance" there is no question of the admissibility of parol evidence "to apply a description." What does not exist cannot be applied.

The only other explanation for the opinion is that the words, "assessed to I. V. Ellis," constitute a description susceptible of application by parol evidence, and this seems to be the true import of the language of the opinion. Here, however, two other difficulties are encountered. First, if "part of a designated division of land being assessed

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[107]See *id.* at 447. See generally 84 C.J.S. *Taxation* § 628 (1954). *Compare* Richter v. Beaumont, 67 Miss. 285, 7 So. 357 (1889), *with* Crawford v. McLaurin, 83 Miss. 265, 35 So. 209, *suggestion of error overruled*, 83 Miss. 278, 35 So. 949 (1904).

[108]Dodds v. Marx, 63 Miss. 443, 446 (1886).

[109]*Id.* at 446 (Campbell, J.).

[110]Cogburn v. Hunt, 54 Miss. 675 (1877).

[111]Meyerkort v. Warrington, 19 So. 2d 433, *opinion withdrawn*, 20 So. 2d 708 (Miss. 1945). Compare Hughes v. Thomas, 29 So. 74 (Miss. 1900).

[112]Meyerkort v. Warrington, *supra* note 111, at 434.

to him who owns a part of it" is applied "to the fact of ownership" it will be found that I. V. Ellis owns no land in lot three, which fact might prove fatal.[113]

Second, and more important to the present significance of the statute, before *Dodds v. Marx* it had been held that, "the words 'for the taxes assessed to the reputed owner,'" Thomas McMahon, of a house and lot in Madison Station were "not descriptive of the thing sold."[114] There appears to be no material distinction between "for taxes assessed to" and "assessed to" since in the latter "for taxes" is certainly included by implication. Therefore, unless this rule were abrogated by the statute, the words "assessed to I. V. Ellis" were also no description whatever and incapable of application. There appears nothing in the first clause of 9775 which indicates a legislative intent to abolish the rule.

On the other hand, if the words "assessed to" are ignored and the description read as "parts of lot three owned by I. V. Ellis" or "I. V. Ellis' parts of lot three," then the description is sufficient without clause one of the statute.[115] Furthermore, if the description is certain in itself, parol evidence is admissible to apply the description without the authority of the last clause of the statute.[116]

Nevertheless, putting the case back together again, the important question remains. If section 9775 does not abolish the rule that the name of the person to whom the property is assessed is not descriptive of the property, does *Dodds v. Marx* hold that it is a "sufficient indication" or "clue" that may be followed by the aid of parol evidence—which is the same thing? If the answer is yes, there is nothing unusual about the case except it overrules *Bowers v. Andrews*.[117] To declare that "clues" furnished by the roll or conveyance will be followed is the same thing as saying that an extrinsic fact incorporated by reference in the deed is part of the description—and description by reference has always been acceptable.[118]

Consequently, it is not the last clause of the statute which makes the description "definite and certain which but for the statute would be void for uncertainty." It provides no new method of describing land; it merely directs that accepted methods shall not be rejected and that the rules of evidence, which have always been available, shall be applied.

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[113]See Boone v. Dulion, 80 Miss. 584, 587, 32 So. 1, 2 (1902).

[114]Bowers v. Andrews, 52 Miss. 597, 607 (1876) (Campbell, J.).

[115]*Ibid.*

[116]See note 88 *supra* and accompanying text.

[117]52 Miss. 596 (1876).

[118]See note 95 *supra* and accompanying text.

C. One Lot and the Buildings Thereon, Southwest Corner Franklin and Pine Streets Assessed to Thomas J. Dowling

The next case in which the statute was invoked gives an equivocal answer to the question of whether the name of the person assessed is a sufficient description by reference. The plaintiff argued that under the statute, parol evidence was admissible no matter how indefinitely the land was described. He also quite correctly urged that the description was sufficient before the statute since there could be only one house and lot on the southwest corner of the named streets. The defendant contended that the name of the party to whom assessed in the list was not evidence because not required by law.

The court said simply, "all uncertainty as to the description of the lot was removed by the evidence."[119] If the decision is based on the ground that the premises are adequately described as a lot on a designated corner of named streets, then there is no uncertainty to be removed by the evidence. If there is an uncertainty to be removed, the clue to the evidence must be found in the name of the person assessed. The meaning of the court's enigmatic disposition of the question seems to manifest itself in the following case.

D. House and Lot, West Side Union Street, Number 40, between State and Washington, City of Natchez, Assessed to Est. C. Lacroze

The bill to confirm a tax title acquired under this description was demurred to on the ground it was void for patent ambiguity, and the chancellor decided it was insufficient to confirm the tax title.

The court reversed, saying only "the description of the land was not void,"[120] and citing the previous case. Obviously a description of a house and lot by street number is sufficient in itself,[121] and there was no evidence introduced here. If this description is good for the same reason as the last one, then the conclusion seems to follow that the preceding description was also sufficient on its face. Thus neither case contributes any to the answer of the question raised by *Dodds v. Marx*.

E. Ten Acres in Southeast Quarter of Northeast Quarter Section 33, Same Being All Southeast Quarter, Except the Interest of Martin (17 Acres) and Hunter (13 Acres)

In *Price v. Ferguson*[122] the statutes were called to the aid of the description of an exception. The requirements of certainty pertaining to descriptions of the subject matter of a deed apply equally to the

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[119]Reber v. Dowling, 65 Miss. 259, 264, 3 So. 654, 655 (1887) (Campbell, J.).

[120]Strauss v. McAllister, 5 So. 625 (Miss. 1889).

[121]See PATTON, *op. cit. supra* note 52, § 122.

[122]66 Miss. 404 (1889).

subtractions from the subject matter.[123] So long as the exception remains uncertain, the part granted cannot be identified.

Ferguson contended the description was sufficient both at common law and under the statute. To establish the location of the exceptions in his deed, he proposed to prove that Price, Hunter, and Martin had been tenants in common and partitioned the subdivision. The deeds to the cotenants were admitted in evidence but Martin's deed did not adequately describe his interest.

Without referring to the statutes, the court said that evidence aliunde "to apply the description of the land to its subject matter" was properly admitted. "But the evidence, while competent, was wholly insufficient."[124]

If the description, "interest of Martin (17 acres)," in the quarter section is sufficiently certain to admit parol evidence to apply the description to the land excepted, then by analogy, the same description would be adequate in an assessment of such. While this sheds light on the problem in *Dodds v. Marx* it is a point which frequently has been overlooked.

F. Eighty Acres of the Southeast Quarter, Section 10, Township 8, Range 8, in Itawamba County

An attempt to uphold the above description was made under a law of 1878 which declared that no assessment would be vitiated by a "failure to designate the precise locality of any sub-division of land within a section," and that it might "be shown by parol testimony . . . to what particular sub-division such assessment or sale was intended to apply."[125] The statute further provided that:

> . . . where part of the land in a particular section, lot or square, has been assessed by proper descriptions, and a portion by a description which does not identify the land, the assessment of that portion which is not properly described shall be held to embrace all the lands in the section, lot or square not embraced in the assessment by proper legal subdivisions.[126]

The facts giving rise to the controversy were these: There were two assessments in the quarter section, one to Stephens (who did not exist) for 40 acres at $2.50 per acre and one in blank for the remaining 120 acres at $1.00 per acre. The complainant claimed to be entitled to the north half of the quarter section, on which the taxes had not been paid by the owner, Sims. At the trial the complainant proved

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[123]See 6 POWELL, *op. cit. supra* note 101, ¶ 888. See generally 39 MICH. L. REV. 318 (1940).

[124]Price v. Ferguson, 66 Miss. 404, 406 (1889).

[125]Miss. Laws 1878, ch. 3, § 18, at 34.

[126]Miss. Laws 1878, ch. 3, § 18, at 34 (now MISS. CODE ANN. § 9775 (1956)).

that the taxes had been paid on the south eighty acres by the owners, and his title to the north eighty was confirmed.[127]

The court considered the effect only of the second part of the statute, which now appears as the third clause of 9775, on the ground that there was no evidence as to what land was intended to be assessed.

In interpreting the second section, however, the court noted that it was for the legislature to prescribe the mode of ascertaining the value of property for taxation and that "this might be by the number of acres where no element of uncertainty as to the particular land arose from variation in value for different parcels owned by different persons of a given tract."[128] Since the land in the section in question varied in value, "this element of uncertainty renders the assessment insufficient on its face," and the provision of the statute is applicable only to "assessments which do not create uncertainty as to the charge on the land."[129]

It is apparent from this that the certainty of the description of the land is only indirectly involved, and the real basis for the decision is the uncertainty of the taxes due. This leaves open the question of whether the same description would be sufficient to give notice and pass title. A partial answer may be inferred from the words of the court:

> A man should know whether he has eighty acres, or any other number in a section or other tract, and if his is part of a larger tract, all valued at the same per acre, there is no uncertainty as to the tax, and no injustice or violation of constitutional right in requiring him to know his own, and pay the charge upon it.[130]

Thus, so far as the requirements of due process are concerned, a specific quantity in a well defined larger tract is a sufficient description—even where the assessment is in blank or to "unknown." But what about the requirement that a description identify the thing conveyed? In voluntary conveyances the general rule is that where the deed does not attempt to describe a particular part of a larger tract but merely conveys a specific quantity from a greater, the grantee takes an undivided interest in the whole tract, measured by the proportion which the number of acres conveyed to him bears to the whole number of acres in the tract.[131] This interest the grantee may have set aside to him in severalty by partition proceedings.[132] Moreover, if the grantor does not in fact own the whole of the larger tract, there seems to be no reason why the quantity conveyed cannot be taken from the part he does

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[127]Sims v. Warren, 67 Miss. 278 (1889).

[128]*Id.* at 284.

[129]*Ibid.*

[130]*Ibid.*

[131]Hodge v. Bennett, 78 Miss. 868, 870, 29 So. 766 (1909). See generally 1 JONES, *op. cit. supra* note 14, § 404.

[132]*Ibid.*

possess.[133] If this method of description is sufficient in voluntary conveyances then it should be equally effective in tax deeds.[134] This the court apparently recognized when, on a second appeal of the case,[135] it observed that, "if the whole of the subdivision in which the land in controversy is located had been valued at one price, a different question would be presented."[136] Furthermore, the legislature has expressly provided, in the third clause of section 9775, that a description by quantity shall be sufficient in tax deeds. It is competent for the legislature to provide what shall be a sufficient description, so long as it does not attempt to dispense with the requirement of certainty,[137] which is fully met by this method of describing land. The law imposes some duty on the taxpayer, as well as the tax assessor.[138]

Although such a description is sufficient between individuals, it appears that without the statute it is not acceptable in tax deeds, as the following descriptions have been held void: two hundred acres in Sec. 2, T. 12, Range 1 East;[139] N. E. $\frac{1}{4}$ Sec. 24, T. 17, R. 7, 143 acres;[140] 37 acres in the N. $\frac{1}{2}$ of Sec. 1, T. 13, R. 4;[141] 20 acres in the E. $\frac{1}{2}$, S. W. $\frac{1}{4}$ section 3, township 14, range 3 E;[142] 4 acres in the NE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Section 9, Township 7, North, Range 12 West.[143]

G. Owner's Name, C. Dowd, Balance Section 8, Township 12, Range 17

The next case under the statute, at first, seems to moot the question of whether the name of the owner is a clue pointing to extrinsic evidence. For apparently, under the decision, no part of the description on the assessment roll can be incorporated in the deed by an implied reference.[144]

In this case, in three separate and successive lines on the roll, lot one in section eight was assessed to Dansby, lot seven was assessed to Dowd, and the balance of section eight was assessed to Dowd. The description appearing on the list of lands sold to the state was that quoted above, and the description in the deed from the state to the purchaser was simply, "balance of section 8" etc.

133See 26 C. J. S. *Deeds* § 30 (c) (1956); Annot., 117 A. L. R. 1071, 1079 (1938).

134*Cf.* Williamson v. DeBruce, 213 Miss. 530, 57 So. 2d 167 (1952).

135Sims v. Warren, 68 Miss. 447 (1890).

136*Id.* at 451. Compare North v. Culpepper, 97 Miss. 730, 53 So. 419 (1910).

137Reed v. Heard, 97 Miss. 743, 754, 53 So. 400, 402 (1910).

138*Ibid.*

139Yandell v. Pugh, 53 Miss. 295, 303 (1876).

140Dingey v. Paxton, 60 Miss. 1038, 1049 (1883).

141Nelson v. Abernathy, 74 Miss. 164, 167, 21 So. 150, 151 (1896).

142Smith v. Hickman, 24 So. 973 (Miss. 1899).

143Heidelberg v. Duckworth, 206 Miss. 388, 40 So. 2d 179 (1949).

144Pearce v. Perkins, 70 Miss. 276, 12 So. 205 (1892).

The court held that the deed presented a patent ambiguity but went on to consider counsel's argument that the roll could be looked to as part of the description. In doing so, the court seems to assume that the description in the deed is the same as that in the list of lands. Nevertheless, it was "unable to perceive upon what principle the defective deed can be aided by the description of the property on the roll."[145] There is, however, some reason to believe that the court was considering only the description in the deed, for at one place it says, "in this case, we think it not permissible" to read the roll into the deed and that "the deed must stand alone, for it does not refer to any other thing in aid of the description."[146]

If this was the basis of the decision, then all the case holds is that the description in the tax deed was too uncertain to convey title from the state. It does not hold that the description in the list of lands was insufficient to put title in the state or that the description on the assessment roll was inadequate to create a lien on the property.

H. Fractional Thirty-eight Acres in Southeast Quarter of Northwest Quarter, Assessed to J. J. Carter

Under the above description, the assessment rolls showing two acres in the west side of the southeast $\frac{1}{4}$ of the northwest $\frac{1}{4}$ assessed to Harrell, the tax receipts of Harrell, and a deed to her describing the two acres by metes and bounds, were admitted in evidence to "identify the land described in the tax deed."[147] The court, however, seems to use the words "identify" and "apply" interchangeably for elsewhere the court says "where the assessment roll furnishes the clue" the evidence "is admissible only to apply the description on the roll."[148]

The court does not explain how it got from the deed to the roll, and the preceding case[149] indicates that the roll cannot aid the deed unless referred to by it. The only reference here to the roll is in the words "assessed to J. J. Carter," which leads back to the question posed by *Dodds v. Marx*:[150] are words "assessed to," if not descriptive of the property, a sufficient reference to a description. The holding of the case seems to demand an affirmative answer since the court upheld the sale under the description.

On the facts then, the case appears to hold: (1) that description by reference is sufficient in a tax deed, (2) the words "assessed to" are words of reference, and (3) the tax deed and the roll referred to,

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[145] *Id.* at 282, 12 So. at 206.

[146] *Id.* at 283, 12 So. at 206.

[147] Illinois Central R. R. Co. v. LeBlanc, 74 Miss. 650, 21 So. 760 (1897).

[148] *Id.* at 672, 21 So. at 762.

[149] Pearce v. Perkins, 70 Miss. 276, 12 So. 205 (1892).

[150] 63 Miss. 443 (1886). See note 117 *supra* and accompanying text.

together, identify the land and constitute a description certain enough (4) to be applied by parol evidence.

One further aspect of the case deserves notice. It is obvious that, in referring to the roll, had the court confined its inquiry to the assessment to Carter, it would have been no better off than before. In order to identify the land assessed to Carter, it had to ascertain what land in the section was assessed to other persons. To do this, the court had to look to other lines of the roll where it found the assessment to Harrell of two acres on the west side of the section. This point is raised because of the attention it has received in several later cases.[151]

I. 90 by 225 Feet, on the West Side of Warrenton Road, Assessed to John Parkhurst, in Section 34, Township 16 North, Range 3 East, in Warren County

The lot sued for under the above description was not located in section thirty-four as recited in the deed but in section 29. The court maintained that this defect alone was sufficient to defeat the sale,[152] but went on to consider what would be the state of the description if the erroneous portion were treated as surplusage. In doing so, the court reiterated the rule in *Bowers v. Andrews*[153] that the name of the person to whom the land is assessed is not descriptive of the land, and also rejected the words "assessed to John Parkhurst." This left only the description "90 by 225, on the west side of Warrenton road" which, of course, could not be applied to any particular land by parol evidence. Since the deed and assessment contained identical descriptions, the court did not consider whether the words "assessed to" were sufficient as a reference from the deed to the roll.

J. Home Lot in Lot 6, Block 4, Ward 1

The next significant case decided under the statutes was *Smith v. Brothers*[154] in which the above description was held void for patent ambiguity under the authority of *Bowers v. Andrews*. In passing on the description the court said:

> The assessment roll cannot aid the description in the deed. The doctrine of *Bowers v. Andrews* is still the law, as a matter of course, notwithstanding [the statutes] . . . . The fact that if the assessment roll furnishes some clew, which, if followed up by parol proof, would identify the land as described on the

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151See, *e.g.*, Brown v. Womack, 181 Miss. 66, 178 So. 785 (1937).
152McQueen v. Bush, 76 Miss. 238, 24 So. 196 (1898).
15352 Miss. 596 (1876).
15486 Miss. 241, 38 So. 353 (1905).

> assessment roll, does not at all affect the other proposition announced in *Bowers v. Andrews* — that a description in a tax deed will be void if the ambiguity therein is patent.[155]
> This case has been misunderstood in part and overruled in part,[156]

but it is submitted that, when carefully analyzed, there is nothing in the opinion inconsistent with the proper application of the statutes.

The court here seems to equate a "patent ambiguity" with a "totally void description," in which case the doctrine of *Bowers v. Andrews*[157] *is* still the law as a matter of course notwithstanding the

The only part of the opinion which cannot be satisfactorily explained is the statement that "the assessment roll cannot aid the description in the deed." The facts do not show in what way it was proposed to aid the deed by the roll. It may be that the roll contained the same description as the deed, in which case it, of course, could not aid the deed.[158]

K. Forty Acres in the West Half of Northwest Quarter, Section 24, Township 25, Range 2 West, West of the Bayou

Five years later the court decided *Reed v. Heard*[159] which should have laid to rest many of the doubts as to the proper application of the statutes.

First the court held that under the last clause of 9775 the above description could be aided by the assessment roll. Now there is no reference or clue in the deed which points to the assessment roll for a more complete description. True, the description contains the subdivision of the section, township, and range, and the lands are assessed by governmental survey, but this is a reference to the plat of the survey and not to the assessment by such survey. Therefore, the court can only mean that under the statute the roll is made part of every tax deed as though it were incorporated therein by express reference.[160]

This interpretation of the statute places the emphasis on the "or" where the statute says parol evidence shall be admissible to apply a description on the roll or in a conveyance where "there is enough in the description on the roll *or* conveyance to be applied." Thus, under this interpretation, the deed and the roll must be looked to as parts of one whole,[161] and if the roll contains a sufficient description, then the

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[155]Smith v. Brothers, 86 Miss. 241, 242, 38 So. 353, 354 (1905).
[156]Reed v. Heard, 97 Miss. 743, 53 So. 400 (1910).
[157]See note 81 *supra* and accompanying text.

statutes.

[158]See Reed v. Heard, 97 Miss. 743, 753, 53 So. 400, 402 (1910).
[159]97 Miss. 743, 53 So. 400 (1910).
[160]*Cf.* Stockstill v. Bennett, 215 Miss. 417, 61 So. 2d 154 (1952).
[161]See Pearce v. Perkins, 70 Miss. 277, 281, 12 So. 205, 206 (1892), in which this argument was rejected by the court.

deed will not be held void for uncertainty. As the court points out,[162] the legislature may provide what shall be a sufficient description, and incorporation of another instrument, whether by reference or by law, preserves the requisite certainty. This interpretation of the method provided further commends itself by giving effect to the intention of the state to convey whatever title it may have acquired under the valid assessment.

A moment's reflection, however, will demonstrate that this interpretation will not work both ways; that is, a sufficient description in the deed will not save a void description on the roll, notwithstanding the two are connected in the disjunctive in the statute.

While the court's construction is sound, it is suggested that the statute will bear another construction equally sound but producing a different result.

In the same sentence the statute speaks of two separate subjects—the "roll or conveyance," which appears twice in the last clause of 9775. Attention is again called to the precise language of the statute, particularly to the italicized portion:

> . . . and parol testimony shall always be admissible to apply a description of land *on the assessment roll, or in a conveyance* for taxes, where such testimony will show what land was assessed and sold, and there is enough *in the description on the roll or conveyance* to be applied to a particular tract of land by the aid of such testimony.

It is submitted that the grammar of the statute indicates that when either one of the two objects in the independent clause of the sentence is considered, the *same* object and not either must be considered in the subordinate clause of the sentence. The statute must be read as though it dealt with only one of the subjects at a time. For example:

> . . . and parol testimony shall always be admissible to apply a description of land *on the assessment roll,* or in a conveyance for taxes, where such testimony will show what land was assessed and sold, and there is enough *in the description on the roll* or conveyance to be applied to a particular tract of land by the aid of such testimony.

The validity of this construction can be proved by taking an insufficient description on the roll and attempting to support it with a perfect description in the deed. If the terms in the subordinate clause were truly interchangeable, this would be possible, but this would permit the correction of the roll by the deed, which cannot be done.[163]

Under this construction, the roll would not automatically be a

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[162]Reed v. Heard, 97 Miss. 743, 754, 53 So. 400, 402 (1910).

[163]Gibbs v. Hall, 38 So. 369 (Miss. 1905).

part of the deed. The deed itself would have to contain "enough in the description to be applied to a particular tract of land," in order to be sufficient. This does not construe all meaning out of the statute. On the contrary, it more accurately preserves it. The statute still directs that parol evidence is admissible to *apply* a description as distinguished from *identifying* the land conveyed.

The fact that the court held the deed could be aided by the roll assumes even greater importance when the facts of the case are closely considered. There were, of course, eighty acres in the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$, and when the roll is referred to in aid of the deed it is found that the forty acres in controversy are assessed to "unknown" by the same description as appeared in the deed. Clearly this is no assistance to the deed. Without any hesitation, however, the court looked to the *next* line of the assessment and found that W. D. Buford was also assessed with forty acres in the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ which he owned and on which he had paid the taxes. The tax deed could apply only to the remaining forty acres and the description therefore was sufficient. On the basis of this decision it appears to be settled that when the roll is referred to, inquiry is not confined to the single line of the assessment in question.[164]

The court achieved this result under the theory that it was "admitting parol testimony to apply a description,"[165] when such is not the case. The court had no description to apply until it looked to the roll. The roll did not apply the description, it provided a description to fill up the vacancy in the deed. Only after a description was found on the roll was parol testimony admissible to apply it by showing that the land claimed, and no other, fitted that description.

Thus far it has been assumed that the roll did furnish a sufficient description, but Buford's land was described in exactly the same words as was Heard's — 40 acres in the W $\frac{1}{2}$ of the N. W. $\frac{1}{4}$. The only difference in the two assessments was that one was to W. D. Buford and the other was to "unknown." Therefore, in order to hold the description valid, the court had to look not only to the description but also to the name of the person assessed with one of the forty acre tracts. The court had to consider the name of the person to whom assessed as descriptive of the property. This is directly opposed to the opinion in *Bowers v. Andrews*,[166] but, without his name, Buford's description was no better than the one under attack.

Once Buford's description was found sufficient, it was then proper to apply it to a particular tract of land by the aid of parol testimony. This was accomplished by allowing Buford to testify as to which forty acres he owned. When this was done, the purchaser knew exactly which

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[164] *Cf.* Illinois Central R. R. Co. v. LeBlanc, 74 Miss. 650, 21 So. 760 (1897).

[165] See Reed v. Heard, 97 Miss. 743, 752, 53 So. 400, 401 (1910).

[166] 52 Miss. 596, 607 (1876).

40 acres he had bought and Heard had known all along on which 40 acres he owed taxes. Since the description was certain enough to convey title and give notice there could be no objection that the description was insufficient. A tax deed description conforming to the rule of this case would read as follows: Tax Deed Description — "for a full and complete description of the property hereby conveyed, reference is made to the assessment roll for Sec. 24, T. 25, R. 2W., said roll being incorporated herein and made a part hereof as fully as though set forth herein;" Assessment Roll Description — "all of the W½ of the N. W. ¼, Sec. 24, T. 25, R. 2W., except forty acres owned by W. D. Buford, which fact of ownership is hereby referred to for a full and complete description of the land excepted herefrom."

It should be noted that by *Reed v. Heard*, "The case of *Smith v. Brothers* is overruled, insofar as it conflicts with this decision."[167] *Smith v. Brothers*[168] seems to conflict with *Reed v. Heard* in that the former case held that "the assessment roll cannot aid the description in the deed."[169] There is one other possible point of conflict and that is the reaffirmation, in *Smith v. Brothers* of the rule of *Bowers v. Andrews* that a patent ambiguity cannot be aided by parol evidence.[170] If, however, the court in *Smith v. Brothers* used the term "patent ambiguity" as synonymous with "totally void" then there is no conflict here. In any event, the holding if not the reasoning would seem still to apply.

In addition to overruling *Smith v. Brothers* the court also declared that *Bowers v. Andrews*:[171]

> is not the law of this state as to what shall constitute a sufficient description of land in an assessment, and has not been the law of this state since the adoption of [the statutes which] . . . were adopted for the very purpose of abolishing the rule laid down in *Bowers v. Andrews, supra*.[172]

The rule laid down in *Bowers v. Andrews* and reiterated in *Smith v. Brothers* was that "a description in a tax deed will be void if the ambiguity therein is patent."[173] As has been shown,[174] this rule has no application to tax deeds, and the abolition of the rule does not appear to be the purpose of the statute which speaks of "applying" a description. Even if this were not the purpose of the statute, it is well that

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[167]Reed v. Heard, 97 Miss. 743, 755, 53 So. 400, 402 (1910).

[168]86 Miss. 241, 38 So. 353 (1905).

[169]*Id.* at 242, 38 So. at 354.

[170]See Jefferson v. Walker, 199 Miss. 705, 727, 26 So. 2d 239, 240 (1945).

[171]52 Miss. 596 (1876).

[172]Reed v. Heard, 97 Miss. 743, 753-54, 53 So. 400, 402 (1910). Compare Cogburn v. Hunt, 54 Miss. 675, 676 (1877).

[173]Smith v. Brothers, 86 Miss. 241, 242, 38 So. 353, 354 (1905).

[174]See note 51 *supra* and accompanying text.

the court thought it was, for it is best to be rid of the rule by whatever means.

Unfortunately, however, the court did not make a clean break with the past. Instead of altogether discarding the rule as the test of the validity of a description, the court said:

> Of course, the sections above do not permit parol testimony to supply a description where a totally void description appears on the assessment roll or tax deed; but such testimony may always be resorted to, whether the ambiguity is patent or latent, where such testimony will show what land was assessed and sold, and there is enough in the description on the roll or conveyance to be applied to a particular tract of land by the aid of such testimony.[175]

The first part of the statement is undoubtedly true; the statutes do not allow parol evidence to *supply* a description. When this statement is qualified, however, by adding "where a totally void description appears" it becomes misleading. It implies that there are degrees of voidness, and if the description is only a little bit void, then a description may be supplied by parol. The deed or the deed aided by the roll must *supply* the description, which may then be *applied* by parol to a particular tract of land.

Still another uncertainty of meaning appears when the statement is read as whole. The court says that parol evidence is not admissible to supply a description where a totally void description appears on the assessment roll *or* tax deed. If this means that parol evidence or, more accurately, extrinsic evidence is not admissible to supply a description where *either* the deed or the roll contains a void description, it is contrary to the court's construction of the statute and the holding of the case, since, although a void description appeared in the deed, the description was supplied by the roll. In order to conform to the result reached, the court must be understood to mean that extrinsic evidence is not admissible to supply a description where a void description appears in the deed *and* on the assessment roll.

The court in the next clause says that "such testimony may always be resorted to, whether the ambiguity is patent or latent," to apply a description. Since a patent ambiguity is one which appears from the face of the instrument to leave in doubt the thing conveyed, this statement is correct only in so far as the deed is concerned. If the deed leaves in doubt the thing conveyed, then the roll may be looked to. Here however the search for a description must stop, and if the roll contains a patent ambiguity, that is, leaves uncertain the thing conveyed, then parol evidence is inadmissible and the deed void. The point of applying the description by parol is never reached because there is no description to apply.

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[175]Reed v. Heard, 97 Miss. 743, 754, 53 So. 400, 402 (1910).

Therefore, this language must be interpreted to mean that a tax deed is not void for uncertainty of description if the roll contains a certain description, and furthermore, where there is a certain description, it may be applied by parol evidence as could have been done before the enactment of the statute under the ordinary rules of evidence.

This is not the end of *Reed v. Heard*, however, for two years later the same case was before the court again.[176] It appears that in the first case, the roll was not actually introduced but merely admitted. In the second case it was shown that the land in controversy was not assessed at all.

The opinion of the court in the second case illuminates its holding in the first. "Confessedly, there was a patent ambiguity in the description of the land given in the tax collector's deed, which as this court held in *Reed v. Heard, supra*, could be explained only by reference to the assessment roll . . . . without this roll, the description in the deed was void for uncertainty."[177]

This tends to confirm two of the conclusions drawn from the first case. First the roll is part of the description in the deed and may always be referred to for a complete description where one is lacking in the deed. Second, a description which is patently ambiguous is equivalent to one which is uncertain; both are absolutely void which precludes the admission of extrinsic evidence for any purpose.

L. One Lot Fifty Feet on the East Half of Lots Seven to Twelve, Block 100, Section 4, Township 8, Range 11, City of Gulfport

The lots described above together comprised a hundred and sixty foot tract running east and west. The court found that the " 'east half of lots seven to twelve' would certainly designate the east eighty feet of these lots."[178] Therefore tax deed calls for fifty feet on the eighty foot tract although the deed does not disclose from which end it is to be taken. Nevertheless, held the court, the description could be aided by proof of what the delinquent taxpayer owned, on the theory that "the description in the tax deed is ambiguous and uncertain, but it is sufficiently definite to come within [the section of the code] . . . permitting oral testimony in aid of the ambiguous description, the uncertainty of which may thus be cured . . . ."[179]

This statement seems to be the origin of much of the confusion concerning the statute.[180] The court admits that the description in the tax deed is uncertain. Unless a sufficient description is found on the

[176]Reed v. Heard, 102 Miss. 28, 58 So. 706 (1912).

[177]*Id.* at 34, 58 So. at 707.

[178]Albritton v. Fairley, 116 Miss. 705, 709, 77 So. 651 (1917).

[179]*Id.* at 710, 77 So. at 652.

[180]See Jefferson v. Walker, 199 Miss. 725, 738, 26 So. 2d 239, 246 (1945).

roll, this should put an end to the case. When the roll in this case is examined the same description is found except it is assessed to Mrs. M. N. Fairley. Under *Reed v. Heard* the next step would be to take the name of Mrs. Fairley as a description by reference which could be applied by proof of what she owned. This is apparently what the court did, but this is not curing an uncertain description by parol testimony. This is considering the deed and the roll as one and applying a sufficient description found therein.

Moreover, this approach would have avoided the problem which the court created for itself by finding that the "east half" of the lots "certainly designated the east eighty feet of these lots." The basis of this assumption is not at all clear and one wonders what would have been the result had the tract been only ninety feet from east to west.

M. North Half of the Northwest Quarter Less One-third Acre to Mrs. Carr

The above description was one of several[181] which was declared void because "It is manifest that the description, per se, as on the roll and in the bill, does not describe the property so as to identify it in a manner that would enable it to be located therefrom by a surveyor."[182]

The court summarized all of the cases on the point, including *Illinois Central R. R. Co. v. LeBlanc*[183] and *Reed v. Heard* without undertaking to relate them to the case at hand, and then said:

> In the case at bar, the only indication on the assessment roll that would show to whom the property belonged was the name "W. T. Barton" in the column on the assessment roll marked "Name of owner." This was held in *McQueen v. Bush, supra,* not to sufficiently identify the property. It merely shows the name of the person to whom the property was attempted to be assessed, and is no part of the description of the property. It does not aid the description in any sense.[184]

On the question of the effect of the name of the owner on the assessment roll, *Carr v. Barton* clearly establishes in Mississippi two lines of authority — one saying the name is not descriptive and the other holding that it is. It can be said of the decision, however, that it bases

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[181]House and west half of lot seven, and ten feet of lot eight and one and one half feet west side of the east half of lot seven; house and two acre lot in section thirty-four; five acres, southwest one-fourth of the north-west one-fourth of section four.

[182]Carr v. Barton, 173 Miss. 662, 670, 162 So. 172, 174 (1935).

[183]74 Miss. 650, 21 So. 760 (1897).

[184]Carr v. Barton, 173 Miss. 662, 670, 162 So. 172, 174 (1935); *accord,* Ransom v. Young, 176 Miss. 194, 168 So. 473 (1936).

the case squarely on the ground of certainty rather than ambiguity. Furthermore, it attempts to provide a criterion for the certainty required by declaring that it must be capable of location by a surveyor.[185]

N. Charlotte Womack, Section 9, Township 12, Range 7, 315 Acres

In *Brown v. Womack*[186] the patent from the state to the purchaser contained a proper description by governmental subdivisions, but the above description appeared in the assessment and the list of lands. Action was brought to cancel the purchaser's title, and in defense he introduced the assessment roll to show that the remainder was assessed by complete descriptions to other persons leaving only the complainant's 315 acres in the south half of the section.

The court says first of the description on the list of lands that "Herein is a patent ambiguity with no clue in the assessment . . . or in the list of lands. . . . Next it is said that the "assessment roll must give the start and suggest the course," but in the very next sentence it is asserted that the clue "must be furnished and appear on the list of lands . . . and cannot be supplied merely by the name of the owner to whom the land is assessed." Then follows the statement from *Smith v. Brothers* that the " 'assessment roll cannot aid the description in a tax deed when it contains a patent ambiguity,' " and finally it is laid down that "the clue must be found in the particular assessment."[187] *Reed v. Heard,* although cited to the court,[188] is not even mentioned in the opinion, and the court held the sale of the lands to be void.

O. East Half Southwest Quarter and Northwest Quarter Southwest Quarter Less Six Acres, Section 2, Township 2, Range

The above description was litigated in *Jefferson v. Walker,*[189] which is probably the leading case in Mississippi on the construction of section 9775.

The lands involved were assessed and sold to the state under the description set forth and were purchased by Walker. A suit to confirm his title was initiated by Walker against the heirs of Jefferson, the

[185]Compare Ransom v. Young, *supra* note 184, at 197, 168 So. at 474 (surveyor must locate land from description in deed and roll); Hatchett v. Thompson, 174 Miss. 502, 511, 165 So. 110, 113 (1935) (surveyor must locate land from description in deed alone).

[186]181 Miss. 66, 178 So. 785 (1937).

[187]Brown v. Womack, 181 Miss. 66, 72-73, 178 So. 785, 786-87 (1937). Compare Miller v. Fulliwiley, 192 Miss. 846, 7 So. 2d 799 (1942) where the section, township, and range were entered for the first assessment in a section but were omitted from the following lines of assessment in the same section.

[188]Brief for Appellants, Brown v. Womack, *supra* note 187, at 69.

[189]199 Miss. 705, 24 So. 2d 343, *suggestion of error overruled,* 199 Miss. 725, 26 So. 2d 239 (1945).

delinquent taxpayer. Among other defenses to the suit it was contended that the deed was void because of a patent ambiguity in the description. It was asserted that the "description was not definite enough to identify the lands, and that the excepted six acres cannot, from the description itself, be allocated to a separate tract,"[190] and therefore the entire sale was void.

The assessment roll showed that the entire east half of the southwest quarter of the section was assessed to Jefferson and that the northwest quarter, less six acres, was assessed to him. The roll further revealed that the other six acres in northwest quarter were assessed to True Light School and that no part of the sub-division was assessed to anyone else.

On these facts the complainant contended that there was no ambiguity whatsoever in the description since "the assessment roll plainly gives the clue to this 6 acres as being the property of True Light School, which clue, when followed to the deed records of the county, gives a perfect description of the 6 acres owned by True Light School and the 34 acres owned by Alex Jefferson at the time of the tax sale."[191]

In sustaining the description and upholding the sale, the court attempted to distinguish the case of *Carr v. Barton* on the ground that:

> Here, every assessment in section 2 was offered in evidence, and the assessment roll showed that the entire East Half of the Southwest Quarter of said section was assessed to Alex Jefferson, and no part of it was assessed to anyone else. It also showed that the Northwest Quarter of the Southwest Quarter, less six acres, was assessed to him, and the other six acres were assessed to True Light School, and no part of said sub-division was assessed to anyone else. In support of this assessment to the True Light School District [the entire chain of record title to True Light School was introduced] . . . . It will thus be seen that the tax conveyance to the state contained a clue, which, traced through the assessment roles [*sic*] and the deeds of conveyances, ultimately led to a definite description of the excepted six acres. No such proof was made in the Carr v. Barton case.[192]

The principal description involved in *Carr v. Barton* was "north one-half of the northwest one-fourth less one-third acre to Mrs. Carr," and it appears that the assessment roll was introduced in that case. Therefore the statement in the instant case that "No such proof was made in the Carr v. Barton case," can only refer to the fact that there was no proof as to what one-third acre Mrs. Carr owned or what Barton owned. No such proof was made because no such proof was admissible. No such proof was admissible because there was no reference, or

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[190] *Id.* at 719, 24 So. 2d at 344.

[191] Brief for Appellees, *id.* at 709.

[192] Jefferson v. Walker, 199 Miss. 705, 720-21, 24 So. 2d 343, 345 (1945).

"clue," to such proof. On the contrary, it was held that the name of the owner on the assessment "does not aid the description in any sense."[193]

It is submitted that *Carr v. Barton* is indistinguishable from the present case. If it is the law in Mississippi then the evidence of what six acres True Light School owned was erroneously admitted. If such evidence was properly admitted in *Jefferson v. Walker*, then *Carr v. Barton* is not the law in Mississippi.

It should be noted also that the reference or clue given by the assessment roll was to the deeds in the chain of title of True Light School. Acceptance of this as a sufficient clue conflicts with another line of Mississippi cases which holds that "reference cannot be had to the calls of private conveyances."[194] There is no reason why such a reference should not furnish a sufficient description but the contrariety of authority is likely to produce confusion.

On suggestion of error[195] the court again ventured into the morass of latent and patent ambiguities. It expressly reaffirmed *Reed v. Heard* and *Albritton v. Fairley* saying of parol evidence that:

> . . . such testimony may always be resorted to whether the ambiguity is *patent* or *latent* . . . .
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> 'The [statutes] . . . were adopted for the very purpose of abolishing the rule laid down in Bowers v. Andrews, supra.'
>
> The said case of Bowers v. Andrews had held that the deed of a tax collector . . . must in itself be sufficient to convey the thing sold. But if that were still true under the statutes involved, parol testimony would not be needed. . . .[196]

This construction of the statute does not give sufficient attention to all of its terms which are that "parol testimony shall always be admissible to *apply* a description." In applying even a perfect description, parol evidence is always needed. This is the only purpose for which the statute directs or permits the introduction of parol evidence, and has nothing to do with explaining ambiguities or supplying descriptions where there are none.

The court next draws a distinction between a patent ambiguity which may be aided by the statutes and an "utterly void" assessment which cannot be so aided. So far as this represents an abandonment

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[193]Carr v. Barton, 173 Miss. 662, 672, 162 So. 172, 174 (1935).

[194]Crawford v. McLaurin, 83 Miss. 265, 275, 35 So. 209, 211, *suggestion of error overruled*, 83 Miss. 278, 35 So. 949 (1904); *accord*, Boone v. Dulion, 80 Miss. 584, 32 So. 1 (1903). *Contra*, Williamson v. DeBruce, 213 Miss. 530, 57 So. 2d 167 (1952); Tamburo v. Standard Oil Co., 164 Miss. 386, 145 So. 107 (1932); *cf.* Seward v. Carter, 190 Miss. 354, 200 So. 248 (1940).

[195]Jefferson v. Walker, 199 Miss. 725, 26 So. 2d 239 (1945) (suggestion of error overruled).

[196]*Id.* at 726-27, 26 So. 2d at 240.

of the latent and patent ambiguity rule it is sound; so far as it implies that the distinction has any thing to do with the proper application of the statute it is misleading. The ambiguity rule is itself a tool for determining the sufficiency of a description. The question of the sufficiency of a description, whether determined by Lord Bacon's rule or by simply asking if it is utterly void, must be resolved in favor of the description before the statute has any effect at all. A sufficient description is a prerequisite to the application of the statute.

An utterly void assessment is one "such as 'part of' a given tract or division, without the number of acres being given *or any other clue* on that *or any other line* of the assessment roll."[197] (Emphasis added.) From this it may be implied that the number of acres is itself a clue and that it is not necessary that the clue be found in the particular line of the assessment. Yet in the next paragraph it is said that:

> It has been uniformly held that an assessment which reads, 'a part of' . . . a known tract or division is an utterly void description, except in a case where the quantity is given, *and* . . . the other lines of the assessment roll of the land in the same tract or division, or the particular assessment, furnishes a clue. . . .[198]

Thus the number of acres alone is not a clue and is no aid at all unless coupled with a clue found anywhere in the assessment of the same section. This conclusion is supported by the cases cited by the court since in all but one[199] the quantity was given and yet they were held void.

The court conceded that "neither the description 'NW $\frac{1}{4}$ SW $\frac{1}{4}$ less 6A.' in the said section, township and range, assessed to Alex Jefferson, nor the other line of the assessment to True Light School, as '6A. NW $\frac{1}{4}$ of SW$\frac{1}{4}$,' was sufficient to identify the location of the part assessed to the respective owners."[200] This assumption would seem to preclude reference not only to other lines of the assessment but also to the name of Jefferson in the particular. Furthermore it would seem to decide the case — against the validity of the assessment. Nevertheless, the court continued:

> Hence, it will be necessary to determine, in the present case, the question of whether or not the last clause of the statute hereinbefore quoted can be applied to uphold the validity of the assessment to Alex Jefferson of the 'NW $\frac{1}{4}$ of SW $\frac{1}{4}$ less 6A' . . . . And it may be conceded that there is not 'enough in the description on the roll or conveyance to be ap-

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[197] *Id.* at 727, 26 So. 2d at 241.

[198] *Ibid.*

[199] Wilson v. Wilson, 97 Miss. 423, 52 So. 353 (1910) (does not involve tax title).

[200] Jefferson v. Walker, 199 Miss. 725, 731, 26 So. 2d 239, 243 (1945).

plied to a particular tract of land,' but the question is whether there is enough 'by the aid of such testimony.'[201]

A careful reading of the statute will disclose in the paraphrase above the omission of an essential phrase which gives to the quoted part a meaning altogether different from the plain language of the statute.

The pertinent clause reads:

> . . . and parol evidence shall always be admissible to apply a description of land on the assessment roll, or in a conveyance for taxes, where such testimony will show what land was assessed and sold, and there is enough in the description on the roll or conveyance *to be applied* to a particular tract of land *by the aid of such testimony*.[202] (Emphasis added.)

Thus the parol evidence is always admissible to aid the application of a description, which is a far different thing from aiding the description. There must already be enough in the description to be applied before parol evidence is admissible. If it is conceded at the outset, as it is here, that there is not enough, then the description can only be "utterly void."

Since it is conceded that the excepted six acres is not sufficiently described, the court applies the rule, well established in voluntary conveyances,[203] that the exception is void, which has the effect of assessing Jefferson with the entire forty acres. The question then, says the court, is whether it is a denial of due process to hold that Jefferson is assessed with all the land he owns in the forty and to give the purchaser the right to show what land was intended to be assessed and sold.[204]

In answering the question posed, the court relies first on the dictum in *Hatchett v. Thompson*[205] that had the description there read W ½ of SW ¼ less 10 acres, it would not have been void.[206] Denying itself the right to look to the name of the persons assessed, the court next takes the "less 6A." as the clue which it follows to the deed records to see who owns the six acres in the subdivision and under what description. This is justified on the ground that "the parol testimony . . . when admissible at all, is not confined to the assessment roll, and such testimony is always admissible where the whole tract or division is

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[201] *Id.* at 731-32, 26 So. 2d at 243.

[202] MISS. CODE ANN. § 9775 (1956).

[203] *E.g.*, McAllister v. Honea, 71 Miss. 256, 14 So. 264 (1893); *accord*, Beasley v. Beasley, 177 Miss. 522, 171 So. 680 (1936).

[204] Jefferson v. Walker, 199 Miss. 725, 729, 26 So. 2d 239, 241 (1945).

[205] 174 Miss. 502, 165 So. 110 (1935).

[206] Jefferson v. Walker, 199 Miss. 725, 734, 26 So. 2d 239, 244 (1945).

assessed, with an exception of a given number of acres therefrom which can be applied to a given tract of land. . . ."[207]

The fallacy here is that the exception was so indefinitely described that it could not be applied, and parol was not "admissible at all." To support its reasoning, however, the court alludes to the rule in *Miller v. Fulliwiley* that the clue does not have to appear in the particular line of the assessment involved and cites *Illinois Central Railroad Co. v. LeBlanc* as authority for the proposition that a deed may be introduced to show who owns acreage excepted from an assessment. The only difficulty with this argument is that it does not fit the facts of the instant case. In *LeBlanc,* when the next line of the roll was examined, a complete legal description of the exception was found. Extrinsic evidence, in the form of the deed, was then admissible to apply the description. When the description of the exception was applied, the remainder assessed was located. In the instant case, there appears nowhere on the roll a certain description capable of being applied by the aid of parol evidence. Furthermore, the court observes that the *LeBlanc* case was decided under the fourth clause of 9775[208] which it concedes has no application to the present case.[209]

Finally it is asserted that *Albritton v. Fairley* "is directly in point to sustain the former opinion in the instant case." It is submitted that if *Albritton v. Fairley* were correctly decided, it must rest on the ground that the name of the person assessed was the clue or reference to a sufficient description which could be applied. This approach the court has abjured in the instant case.

Nevertheless, the court accepts the evidence of what Jefferson and True Light School own and holds that:

> This proof had the effect of establishing to a moral certainty what land was assessed and sold as belonging to Alex Jefferson; that he necessarily knew exactly what 6 acres of the forty had been conveyed away, and what land therein he was intended to be assessed with, as affording to him due process of law after due notice of the assessment against him; that any one interested in bidding on said land at the tax sale was furnished by the assessment roll on the 40 acres such information as, when followed up, would lead to the ascertainment of the particular tract of land to be offered for sale as the property of Alex Jefferson; that is to say, there was enough in the description on the roll, 'NW $\frac{1}{4}$ of SW $\frac{1}{4}$ less 6A.' plus the additional assessment of '6A. in the NW $\frac{1}{4}$ of SW $\frac{1}{4}$'—even though one must close his eyes to the fact that the latter description followed the name of True Light School under

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[207] *Id.* at 736, 26 So. 2d at 245.
[208] *Id.* at 737, 26 So. 2d at 245.
[209] *Id.* at 731, 26 So. 2d at 243.

> the caption 'To whom assessed'—to be applied to a particular tract of land in the 40-acre tract by the aid of parol testimony. . . .[210]

An analysis of the holding indicates that it is based solely on the descriptions as quoted by the court, that is, without the aid of the name of either True Light School or Jefferson. Yet the court says later that "one must close his eyes to the fact that the *latter* description followed the name of the True Light School." This would seem to imply that one need not close his eyes to the fact that the *former* description followed the name of Jefferson. This inference, however, is rebutted by the fact that the court declined to overrule *Carr v. Barton*, which did hold that the name of the person assessed was no part of the description, and made every effort to avoid collision with the rule in *Carr v. Barton*.

If the decision must stand on the descriptions alone, it holds in effect that not only is the roll incorporated in the tax deed but that the deed records, without any express reference thereto, are also incorporated in the roll. This must be so because without the description by reference or "clue" to the deed books, the descriptions in the instant case would be too uncertain to be applied to a particular tract.[211]

If this conclusion is correct, then there is another lesson to be drawn from the case. In the course of the opinion, the court points out that:

> It has been uniformly held that an assessment which reads, 'a part of,' or 'six acres in' a known tract or division is an utterly void description, except where the quantity is given, *and* . . . the other lines of the assessment roll of the land in the same tract or division, or the particular assessment, furnishes a clue . . . which will make the description certain.[212]

It should be noted that the court here is speaking of two types of descriptions—a description of an unidentified part of a larger tract[213] and a description of a specified quantity out of a larger tract.[214] In support of its observation, the court cites cases of both classes, but in all except one,[215] which did not involve a tax deed, the quantity *is* given. This seems to indicate two things. First, even where the quantity is given, the description will be void unless there is a reference to something, such as the deed records, which gives a certain description. Second, the court makes no distinction between the two types of descriptions.

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[210]*Id.* at 738, 26 So. 2d at 246.

[211]*Id.* at 732, 26 So. 2d at 243.

[212]*Id.* at 727, 26 So. 2d at 241.

[213]See note 47 *supra* and accompanying text.

[214]See note 131 *supra* and accompanying text.

[215]Wilson v. Wilson, 97 Miss. 423, 52 So. 353 (1910).

In the instant case the description was "NW ¼ of SW¼ less 6A." The court said that there is no reason why it could not take "the 'less 6A.' as the clue" and find from the deed records who owns the six acres under a valid description because such was always permissible "where the whole tract or division is assessed, with an exception of a given number of acres therefrom which can be applied to a given tract."[216]

Now what is the difference in a description of land as "NW ¼ of SW ¼ less 6A.," and as "34 acres in the NW ¼ of SW ¼," or as "NW ¼ of SW ¼ — 34 acres"? Furthermore, why is it necessary to take the circuitous route of determining from the deed records who owns the six acres to be subtracted from the larger tract? Why would it not do equally well simply to see who owns the thirty-four acres? To say that a description such as "34 acres in the NW ¼ of the SW ¼" is "utterly void" whereas "NW ¼ of SW ¼ less 6 acres," is sufficient is to make a distinction where there is none.

The holding and the dictum of *Hatchett v. Thompson*, on which the court relies in the instant case, recognizes such a distinction and at the same time shows that it has no basis in reason. There the description was "70 acres in the W ½ of the SW ¼." The court held the description to be void but said if it had read "W ½ of SW ¼ less 10 acres" it would be good.

It is submitted that there is no difference between the two descriptions, and there is no reason why an assessment of a specified quantity in a given section is not as sufficient a reference to the deed books as an exception of a specified quantity from a given section. If this proposition is accepted, it necessarily follows that those cases where "it has been uniformly held that an assessment which reads . . . 'six acres in' a known tract or division is an utterly void description," are overruled *sub silentio*. Furthermore, since the court seemingly recognizes no distinction between descriptions by quantity and descriptions by parts, those cases holding that an assessment of "a part of" a known tract is void, are likewise overruled where the quantity is given. That the holding in *Jefferson v. Walker* does extend to such descriptions is borne out by *Loper v. Hinds Land Co.*[217] The description there was "7.64 a NE Cor. Sec. 11," which under previous decisions would have passed so much of the land intended as would be contained in a square of that area in the designated corner.[218] The court held, however, that under *Jefferson v. Walker* it was permissible to refer to the deed records for a metes and bounds description of a triangle.

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[216]Jefferson v. Walker, 199 Miss. 725, 736, 26 So. 2d 239, 245 (1945).

[217]214 Miss. 644, 58 So. 2d 88, *modified on suggestion of error*, 214 Miss. 657, 59 So. 2d 326 (1952).

[218]See note 52 *supra* and accompanying text.

P. Miscellaneous Descriptions

There are numerous other descriptions which have not been as significant as vehicles for the development of the law in this area. Some merely involve variations in the application of rules forged in the cases already examined. Others are sui generis. Nevertheless they may prove of some value to the researcher.

The following descriptions, appearing in tax deeds or on the assessment roll, have been held sufficient in themselves or as the basis for the admission of extrinsic evidence: Spanish claim, Sec. 13, T. 4, R. 1 E., 640 acres;[219] 1 lot, S. by Washington street, E. by N. Pitre, N. by Fireman's Hall, W. by Lamense st. (less lot sold to Zuberier & Behan), T. 7 R. 9;[220] lot 6, McLeod's division, west side of river, section 12, township 6, range 6 W., assessed to John A. Gordon;[221] east fractional section 12, township 6, range 6 W., assessed to Unknown;[222] All 200.50, S. 22, T. 1, R 4 W.;[223] All Spanish claim 600½, S. 25, T. 1 R. 4 W.;[224] Fract. 16-1/6, S. 9, T. 1, R. 5 W.;[225] In N. & W. pt. 96-1/6, S. 1, T. 1, R. 5 W.;[226] assessed to Betty Lynch, to wit; West part, north west ¼ section 29, township 1, range 8, one hundred and ten (110) acres, more or less;[227] south half of north half, lot 5, Block 113, Kamper & Whinnery No. 2, Forrest county, Miss.;[228] Lots 37, 38, and 39, Moore's addition to the town of Poplarville, Eugene Moore, owner;[229] Joshua Davis East one-half, East one-half and West one-half, West one-half, East one-half and East one-half, West one-half, West one-half, East one-half, Section 8, Township 19, Range 8;[230] 1 Lot in Sec. 8, T. 14, R. 8 desc. in Bk. 199 Page 53 Town of Glen Allen;[231] lots 14 and 16 of Block 6 in Plat 2 of Belhaven Heights;[232] Pt. NW ¼ North side (containing 115 acres) of section Eighteen (18);[233] NE ¼ of the NE ½ less 2A in Section

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[219]Harvard v. Day, 62 Miss. 748 (1885). Compare Dimitry v. Lewis, 150 Miss. 818, 117 So. 265, *appeal dismissed*, 278 U. S. 570 (1928); Dimitry v. Jones, 149 Miss. 641, 115 So. 786 (1928).

[220]Lochte v. Austin, 69 Miss. 271, 13 So. 838 (1891).

[221]Gordon v. Kitrell, 21 So. 922 (Miss. 1897).

[222]See *id.* (*semble*).

[223]Trager v. Jenkins, 75 Miss. 676, 23 So. 424 (1898).

[224]*Ibid.*

[225]*Ibid.*

[226]*Ibid.*

[227]Wheeler v. Lynch, 89 Miss. 157, 42 So. 538 (1906).

[228]Standard Drug Co. v. Pierce, 111 Miss. 354, 71 So. 577 (1916).

[229]Martin v. Smith, 140 Miss. 168, 105 So. 494 (1925).

[230]Talmadge v. Seward, 155 Miss. 580, 124 So. 791 (1929).

[231]Tamburo v. Standard Oil Co., 164 Miss. 386, 145 So. 107 (1932).

[232]Belhaven Heights Co. v. May, 187 Miss. 101, 192 So. 6 (1939).

[233]Johnson v. Carter, 193 Miss. 781, 11 So. 2d 196 (1942) (conveyed only eighty acres).

13;[234] Lots 1 & 2, Div. J. J. W. Est. Sect. 21, T 7, R 3 East, containing 110 acres, more or less;[235] lot 6, Sq. 3 of Sherrod's Subdivision;[236] lot 6, Div. W. Estate, Section 8, Township 7, Range 2 assessed to E. W. Simmons;[237] Lots 1 and 2 of J. M. McBeath's Subdivision of Block 21 of Dearman's Survey, recorded in Map Book 1, p. 26, in the City of Meridian;[238] Lots 1 and 2 of Block 21 of and according to Dearman's survey of the City of Meridian, Map Book 1, p. 26;[239] lot 2, Block 20, Adams Survey, Town of Eupora;[240] All of that part west of Tallahala Creek NW $\frac{1}{4}$ of SE $\frac{1}{4}$;[241] N — Humes, E & W — Thompson, S — Davis, T wp. 8 R. 1 E, 66 acres;[242] lots 7 to 24 inclusive, Garraway Addition in Section 31;[243] House and lot 147 x 295 ft. North side R.R. per DB 57, P 588, Sec. 19, T. 7, Range 8.[244]

The descriptions following have been held insufficient because of a patent ambiguity, or because they were utterly void, or because they failed to furnish a clue to a description susceptible to application to a particular tract of land: S.W.P.P. in S.P. Spanish Claim, Sec. 30, T. 1, R. 3 W. 261.25 acres;[245] lot 9, on the south side of Otto street;[246] one lot south and west by Thompson, east by Voivedich, north by Bradford, township 7, range 9;[247] Huntington & LeValley Add. Owner's name Goyer Company, All section 9 and 10, Township —, Range 18;[248] lot 6, Collier's Estate, section 37, township 17, range 4 east; 13 acres;[249] lot 38, except lots sold to Russell, Gottschalk Survey, sec. 8, Tp. 8, R. 11;[250] lot 17, in S.E. $\frac{1}{4}$ of S.W. $\frac{1}{4}$, section 18, township 7, range 8 east;[251] south

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[234]Simmons v. State, 199 Miss. 271, 24 So. 2d 660 (1946).

[235]Howard v. Wactor, 41 So. 2d 259 (Miss. 1949).

[236]Freeman v. Adams, 207 Miss. 760, 43 So. 2d 362 (1949).

[237]Sims v. Crecink, 208 Miss. 873, 45 So. 2d 737 (1950).

[238]Williamson v. DeBruce, 213 Miss. 530, 57 So. 2d 167 (1952) (assessment).

[239]*Id.* (deed).

[240]Meek v. Farmers' Cooperative, 216 Miss. 140, 61 So. 2d 778 (1953).

[241]Richton Tie & Timber Co. v. McWilliams, 218 Miss. 355, 67 So. 2d 374 (1953).

[242]Humes v. Krauss, 221 Miss. 301, 72 So. 2d 737 (1954). *But cf.* Boone v. Dulion, 80 Miss. 584, 32 So. 1 (1903).

[243]Melvin v. Parker, 223 Miss. 430, 78 So. 2d 477 (1955).

[244]Leavenworth v. Lloyd, 229 Miss. 880, 92 So. 2d 224 (1957) (dictum).

[245]Morgan v. Schwartz, 66 Miss. 613, 6 So. 326 (1889).

[246]Illinois Central R. R. Co. v. Baldwin, 77 Miss. 788 (1900).

[247]Boone v. Dulion, 80 Miss. 584, 32 So. 1 (1903). *But cf.* Humes v. Krauss, 221 Miss. 301, 72 So. 2d 737 (1954).

[248]Levenworth v. Greenville Wharf & Storage Co., 82 Miss. 578, 35 So. 138 (1903) (section meant lot and range meant block).

[249]Crawford v. McLaurin, 83 Miss. 265, 35 So. 209, *suggestion of error overruled*, 83 Miss. 278, 35 So. 949 (1904) (land being all of fractional section 39, twenty acres).

[250]Boone v. Wells, 91 Miss. 799, 45 So. 571 (1908). *Compare* Lochte v. Austin, 69 Miss. 271, 13 So. 838 (1891), *with* Meek v. Farmers' Cooperative, 216 Miss. 140, 61 So. 2d 778 (1953).

[251]Cassidy v. Hartman, 93 Miss. 94, 46 So. 536 (1908) (private plat of rural area).

half of section 6, township 6, range 17 W;[252] E. ½ of N.W. ¼ of S.W. ¼ Reg. Section 19, part Walter Denny Conf. No. 40;[253] incomplete metes and bounds description equivalent to 20 acres in section 25;[254] 20 acres in NE part of section 3;[255] Central 1/3 6, 7, 8 Blk. 137, K. & W.;[256] NW ¼ of SE ¼ north of creek;[257] All lots 13, 14 & part of lot 15, Blk. 35 per D. B. 58, pages 86, 87, Sec. 30, T. 7, R. 8;[258] House and lot 147 X 295 ft. North side R. R. per DB 57, P 588, Sec. 19, T. 7, Range 8.[259]

VI. Conclusion

There is an inherent distinction between tax sales and voluntary conveyances. For this reason, rules and analogies from cases involving private deeds should be cautiously applied to cases involving tax deeds. Descriptions in tax deeds which, when given their plain and ordinary meaning, are incapable of application to a particular tract of land by a surveyor should be declared void for uncertainty. Extrinsic evidence is never admissible to supply a description. Extrinsic evidence is always admissible to apply a sufficient description. No extrinsic evidence of intention is ever admissible for any purpose.

It is not necessary, however, that a complete description appear on the face of the deed. If the deed refers to an extrinsic fact or writing which, when referred to, identifies the land with certainty, the description is sufficient. Furthermore, an express reference is not required. A tax deed impliedly refers to the assessment roll. The roll, through the section, acreage, and possibly the name of the person assessed, impliedly refers to the deed records. If these three instruments together supply a certain description, then it may be applied to a particular tract of land by extrinsic evidence.

These conclusions, however, leave many decisions either unexplained or overruled. Since the latter cannot be presumed, it must be recognized that there is a conflict in the cases which cannot be reconciled.

Alfred E. Moreton III

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[252]Weston Lumber Co. v. Strahan, 128 Miss. 54, 90 So. 452 (1921) (incapable of application to north half of Elisha Lott claim).

[253]Lott v. Rouse, 147 Miss. 802, 111 So. 838 (1927) (section 19 being a fractional section). Compare Selden v. Coffee, 55 Miss. 41 (1877).

[254]Patterson v. Morgan, 161 Miss. 807, 138 So. 362 (1931) (noted that no evidence of other assessments was offered).

[255]Evans v. Shows, 180 Miss. 518, 177 So. 786 (1937) (incapable of application to twenty acres in N. W. part).

[256]Seward v. Carter, 190 Miss. 354, 200 So. 248 (1940).

[257]Richton Tie & Timber Co. v. McWilliams, 218 Miss. 355, 67 So. 2d 374 (1953).

[258]Figeuroa v. Lemon, 222 Miss. 806, 77 So. 2d 320, *suggestion of error overruled,* 222 Miss. 812, 78 So. 2d 342 (1955) (section and reference to deed book both being erroneous).

[259]Leavenworth v. Lloyd, 229 Miss. 880, 92 So. 2d 224 (1957) (reference to deed book being erroneous).

THE AD-LIB STATEMENT ON TELEVISION— LIBEL OR SLANDER

I. History

The origin of the law of defamation and its anomalies remaining in the present law of libel and slander are found in the struggle for extension of jurisdiction between the ecclesiastical courts and the common law courts.[1] The common law courts were not long in depriving the other of most of their jurisdiction. In the remedy provided by the common law, the damage resulting from the insult and not the insult itself, was the gist of the action.[2] It is from this fact among others that legal writers have often criticized the continued existence and promulgation of the distinction between the actions of libel and slander. "The law went wrong from the beginning in making the damage and not the insult the cause of action. . . ."[3] While the common law courts were developing the tort law of defamation, the Star Chamber had assumed jurisdiction over defamation occurring in print, punishing the offender as a criminal on the theory of protecting the government and therefore the public peace.[4] Thus, there had arisen, during the tenure of the Star Chamber, the two areas of defamation: the tort action in the common law courts and the criminal action at the hands of the Star Chamber. And with the abolition of the Star Chamber, its criminal jurisdiction based on the written defamation was gradually assumed by the common law courts.[5] In this fashion, the forms of the distinctions between libel and slander began to become solidified.

> . . . . A new principle of actionable defamation based upon mere form, was introduced into the law. The original common law doctrine of defamation, based upon the nature of the imputation, became stereotyped as the law of spoken defamation, or slander; the doctrine inherited from Roman law, through the Star Chamber, became the law of written and printed defamation, or libel.[6]

The foregoing developments in the law of defamation have left the following distinctions between libel and slander. The former, being written, is presently deemed to be actionable per se; that is, it is actionable without proof or pleading of special or temporal damages.[7] In the

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[1] 8 Holdsworth, A History of English Law 335.

[2] Restatement, Torts, § 568, Comment b (1938).

[3] Pollock, Torts 249 (13th ed. 1929).

[4] Restatement, Torts, *supra* note 2.

[5] Fisher, *The History of the Law of Libel*, 10 Law Quarterly Review 162-63 (1902).

[6] Veeder, *The History and Theory of the Law of Defamation*, 3 Col. L. Rev. 546, 547 (1903).

[7] Prosser, Torts § 93, at 587 (2d ed. 1955).

case of the latter, an oral defamatory remark is not actionable unless the plaintiff prove some actual damage.[8] Generally, there are exceptions to the last stated rule. These exceptions fall into the category of remarks that are labelled as being slanderous per se; that is actionable without proof or allegation of special damages.[9] They are: (1) imputation of the commission of a crime;[10] (2) imputation of a loathsome disease;[11] (3) imputation affecting one in his trade, business, profession, or office;[12] and in several states there is the added category of imputation of unchastity to a woman.[13]

It has been said that the development of the distinctions between the law of libel and slander were a product of convenience—the common law courts attempting to usurp the jurisdiction of the ecclesiastical courts.[14] The existence of the distinction and obvious inequities resulting have been criticized from several viewpoints. It first must be remembered that they are a result of a procedural transition; an extension of the power of the common law courts and then, after an overwhelming volume of litigation, an attempt to limit the area of recovery in defamation actions generally.[15] One justification for the leniency of recovery in a libel action is that the written form of publication is more permanent in nature than is the oral slanderous statement.[16] Historically, permanence of form has been considered the basic justification for the liberality of recovery in libel actions. In the early development of the two areas of the law of defamation, it is obvious that the difference had a meaningful basis. During a period when there were no media of mass communication, certainly a written statement potentially was capable of greater harm than an oral statement. The written statement preserved the initial utterance and was therefore capable of reaching more people. It is submitted, then, that the true test should be capacity for harm rather than permanence of form.[17] Therefore, a defamatory statement published on the radio or television satisfies the capacity for harm test in that both have unprecedented areas of dissemination and should be governed by the law of libel and not slander.[18] It is the purpose of this comment to illustrate the bases on which the various jurisdictions

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[8] *Id.* at 588.

[9] See generally *id.* at 589-93.

[10] Id. at 589.

[11] *Id.* at 590.

[12] *Id.* at 590.

[13] Id. at 592.

[14] Veeder, *supra* note 6, at 558, 571-72.

[15] See generally Carr, *The English Law of Defamation*, 18 L. Q. Rev. 390 (1902).

[16] Restatement, Torts § 568, comment d (1938).

[17] Prosser, *op. cit. supra* note 5, at 595.

[18] *Developments in the Law—Defamation*, 69 Harv. L. Rev. 875, 888-89 (1955-56).

have maintained the differences between the two actions and to illustrate the analogies used to reach the opposing results when applied to the "ad-lib" statement made on television.

II. Analogies

A. The Newspaper-Radio Analogy

The mass media of the publishing world have given rise to at least two theories of recovery for a written defamation: strict liability and negligence.[19] Liability is not based on the intention of the utterer in those jurisdictions which recognize the former theory.[20] The two leading cases held that the test of liability is whether a third person could determine if the publication was "of and concerning" the plaintiff;[21] that is, those to whom the words are conveyed must reasonably have understood the statement to apply to the plaintiff. It is argued that with regard to the rush for printing deadlines, rapid reporting, in material that is to be disseminated from day to day via the newspaper, some mistake is bound to appear or some objectionable matter to escape notice even when due care is used.[22]

The case of *Sorensen v. Wood*[23] is the leading case in the application of the strict liability theory to both the owner of the radio station and the employee-announcer. In holding that a broadcast of a defamatory statement on the radio is libelous rather than slanderous the court said:

> We think there is nothing fundamentally new in the applicable law. . . . There can be and is little dispute that the written words charged and published constitute libel rather than slander. . . .[24]

> It has often been held in newspaper publication, which is closely analogous to publication by radio, that due care and honest mistakes do not relieve a publisher from liability for libel. . . . If the publication was libelous, the defendant took the risk. . . . 'Whenever a man publishes, he publishes at his peril.'[25]

The treatment accorded radio defamation by the Nebraska court was favorably received by courts of several states.[26] However, in 1939, the

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[19]Prosser, Torts § 94, at 602-06 (2d ed. 1955).

[20]*E.g.* Hulton and Co. v. Jones, [1909] 2 K.B. 444, *aff'd* [1910] A.C. 20; Peek v. Tribune Co., 214 U.S. 185 (1909).

[21]Macfadden's Publications v. Turner, 95 S.W.2d 1027 (Tex. Civ. App. 1936).

[22]Vold, *The Basis for Liability for Defamation By Radio*, 19 Minn. L. Rev. 611, 631-32 (1935).

[23]123 Neb. 348, 243 N.W. 82 (1932).

[24]*Id.* at 85.

[25]*Id.* at 86.

[26]See generally Vold, *supra* note 22.

opposite result was reached by the Pennsylvania Supreme Court in the case *Summit Hotel Co. v. National Broadcasting Co.*[27] In that case the court reasoned firstly that Pennsylvania had never accepted the theory of absolute liability with regard to newspaper defamation but in all of its tort remedies, had based the action on "some blameworthy conduct, or lack of due care resulting in the violation of a duty owing to others."[28] Secondly, the court noticed that the defamatory remark was interpolated by a third party not under the control of the radio station owner and that the remark was not a part of the written script which the lessor of the station had knowledge of or any way of preventing. Therefore, the court concluded that a broadcasting company, leasing its facilities, is not strictly liable for an interjected defamatory remark where it exercised due care in both choice of lessee and inspection of the script, provided the lessor had no control of the interpolater.

It should be noted that the Pennsylvania court used the same facts to support its argument in favor of slander as were used by the Nebraska court in *Sorensen v. Wood.* The court stated:

> Newspaper matter is prepared in advance, reviewed by members of the various staffs, set into type, printed, proof read, and then run off by employees of the publisher; at all times opportunity is afforded the owner to prevent the publication of the defamatory statement up to the time of the delivery of the paper to the news-vendor. The defamation thus may be said to be an intentional publication, or at least one published without due care.[29]

That court also resorts to the traditional test "permanence of the printed libel, and its capacity for continuous future harm over a wide area." And it states that the argument that the radio has as great a potential for harm as the printed word and therefore should be treated as slander has no merit because that argument ignores the permanency of form and the belief in the veracity of the printed word.[30] As was pointed out earlier, the reason for the permanency rule was that in the origin of defamation, communication was limited and the permanency of form naturally allowed a wider area of dissemination. Therefore, more people were reached by the defamatory statement. Furthermore, this court apparently added the word "future" to the common law test, making it even more rigid than it had been.

Professor Vold effectively refutes the argument that newspaper defamation cases are not applicable to radio defamation.[31] ". . . . There are no such decisive differences between the physical facts involved in

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[27]336 Pa. 182, 8 A.2d 302 (1939).

[28]*Id.* at 304.

[29]*Id.* at 309.

[30]*Id.* at 310.

[31]Vold, *supra* note 22, at 631.

the operation of publication by newspaper and by radio." His disagreement lies in the fact that although the newspaper can exercise control, it cannot be complete control and the facts of radio broadcasting being different, yet the control of the broadcasting can be less complete. Neither can one predict how a statement will be received by the "readers."

These two cases alone indicate that there is little agreement among the authorities either in case law or among legal writers concerning the treatment to be accorded radio defamation. It appears that there should be no problem in reaching the conclusion that a defamatory remark read from a prepared script will be accorded the treatment of libel. In the case of *Hartmann v. Winchell*[32] the court said that ever since *John Lamb's Case*[33] and the case of *Snyder v. Andrews*[34] it has been clear law that "if a man read a libel on another to himself and then read it out that made him a libeller."[35] Therefore, the court held that the statement read from a script in a radio broadcast constituted libel. This result has been criticized on the ground that it should make no difference as far as the action is concerned whether read from a script or uttered extemporaneously because the radio listener has no way of knowing whether the words were read from a script or ad-libbed. "Furthermore, what difference does it make to such person, so far as the effect is concerned?"[36] Be that as it may, the court in *Hartmann v. Winchell*[37] refused to ". . . do what Mansfield, C. J., in 1812 declared he could not do, namely, abolish the distinction between oral and written defamation. . . . 'What gives the sting to the writing is its permanence of form.' This is true whether or not the writing is seen."[38]

The real value of the *Hartmann* case is found in the enlightened views expressed by Judge Fuld in his concurring opinion. He decided that the question at issue—whether defamation read from a script was libel—could not be realistically treated without resolving whether a defamatory ad-lib was to be considered libel or slander. "It impresses me as unreal to have liability turn upon the circumstance that defendant read from a script when . . . none of his listeners saw that script, or, indeed, was even aware of its existence."[39] He reasoned that, since courts traditionally impose broader liability for libel because of its permanence of form, wider range of dissemination and greater capacity for harm then:

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[32]296 N.Y. 296, 73 N.E.2d 30 (1947).

[33][1610] 9 Co. Rep. 60.

[34][1849] 6 Barb. 43.

[35]Hartmann v. Winchell, *supra* note 32, at 299, 73 N.E.2d at 31; Miles v. Wasmer, Inc., 172 Wash. 466, 20 P.2d 847 (1933).

[36]Irwin v. Ashurst, 158 Ore. 61, 64, 74 P.2d 1127, 1129 (1938).

[37]296 N.Y. 296, 73 N.E.2d 30 (1947).

[38]*Id.* at 300, 73 N.E.2d at 32.

[39]*Id.*

> Where account is taken of the vast and far-flung audiences reached by radio today . . . it is evident that the broadcast of scandalous utterances is in general as potentially harmful to the defamed person's reputation as a publication by writing. That defamation by radio, in the absence of a script or transcription, lacks the measure of durability possessed by written libel, in no wise lessens its capacity for harm. Since the element of damages is, historically, the basis of common law action for defamation, and since it is as reasonable to presume damage from the nature of the medium employed when a slander is broadcast by radio as when published by writing both logic and policy point the conclusion that defamation by radio should be accountable per se.[40]

An often quoted Australian case,[41] reached a much criticized decision[42] when it concluded that defamation read from a prepared script should be treated as slander with the principal argument being based on the notion that the listeners would not necessarily know whether the matter was read or not, and the distinction between the actions of libel and slander lies in the mode of publication.[43]

B. The Telephone-Telegraph Analogy

There has been criticism of the theory of absolute liability when an attempt is made to apply the newspaper analogy to the extemporaneous remark made on the radio.[44] Some critics urge that the analogy should be between the liability of broadcasting companies and telephone companies,[45] the latter generally not being held strictly liable. Yet, in a leading case,[46] when that argument was made the court rejected the telephone analogy. The case involved the transmission over telephone wires of a broadcast which was ultimately disseminated by a radio broadcasting company. The contention of counsel for the defendant was that an analogy should be drawn between the broadcasting company's liability and that of the non-negligent telephone company whose wires carry the defamatory utterance to a listener. The court, in rejecting the argument, stated:

> In a certain sense the telephone company does take a libelous message given it in the form of spoken words, changes it into electrical impulses, and sends it out over its wire. So far the analogy with what is done by the operator of a broad-

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[40] *Id.* at 304.

[41] Meldrum v. Australian Broadcasting Co. [1932] Vict. L. R. 425.

[42] Barry, *Radio, Television and the Law of Defamation*, 23 AUST. L. J. 203 (1949).

[43] *Id.* at 207.

[44] Note 27 *supra* and accompanying text.

[45] 2 SOCOLOW, THE LAW OF RADIO BROADCASTING § 472 (1939).

[46] Coffey v. Midland Broadcasting Co., 8 F. Supp. 889 (W.D. Mo. 1934).

> casting station is good. But the analogy does not persist. The telephone company, assuming the absence of negligence, but carries a message (in a sealed envelope, as it were) from the sender to a single person. The operator of the broadcasting station publishes the message to the world. If this distinction is a practical one rather than theoretical, it is nevertheless a most significant distinction and quite enough to support an entirely different measure of responsibility.[47]

This case represents another of the jurisdictions adhering to the doctrine of strict liability for defamation on the radio.[48] It has been suggested, however, that the attempt to analogize the radio and telephone liability is a fallacious one because telephone companies are not under the same strict duty of supervision and control that the broadcasting company must exercise. Moreover, telephone companies are required to provide the use of their facilities without discrimination.[49]

The *Restatement of Torts*,[50] while announcing that an utterance from a prepared script on the radio may be libel, does not take a stand on the question of classification of the extemporaneous broadcast statement. But it does leave room for the same construction of the extemporaneous statement by asserting that the solution is dependent upon the following factors: "The area of dissemination, the deliberate and premeditated character of the publication, and the persistence of the defamatory conduct. . . ."[51]

Another area in which it has been urged that an analogy can be effectively drawn is that of telegraph companies.[52] Here, liability for defamation is limited to transmissions that are negligent, not in good faith, and libelous on their face.[53] However, it would seem that this analogy, as in the case of the telephone, is erroneous for the same reasons: i.e. even though the physical acts necessary to the transmission are somewhat similar, the limited capacity for harm, necessarily, must exist because the transmission is "published" to so few people as compared with the radio.[54]

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[47] *Id.* at 890.

[48] Sorensen v. Wood, 123 Neb. 348, 243 N.W. 82 (1932); Hartmann v. Winchell, 296 N.Y. 296, 73 N.E.2d 30 (1947); Locke v. Gibbons, 164 Misc. 877, 299 N.Y. Supp. 188 (1937); Irwin v. Ashurst, 158 Ore. 61, 74 P.2d 1127 (1938); Miles v. Wasmer, 172 Wash. 466, 20 P.2d 847 (1933).

[49] 2 Socolow, *op. cit. supra* note 45.

[50] Restatement, Torts § 568, comment b (1938).

[51] *Id.*

[52] Note, *Television Defamation—Libel or Slander?*, 42 Va. L. Rev. 63, 69 (1956).

[53] Peterson v. Western Union Tel. Co., 72 Minn. 41, 74 N.W. 1022 (1898); Western Union Tel. Co. v. Cashman, 149 Fed. 367 (5th Cir. 1906).

[54] See 2 Socolow, *op. cit. supra* note 45, at § 473.

C. The Motion Picture Analogy

The last situation, and the most obvious one from which to draw an analogy to defamation on television is the motion picture production that is libelous. Upon the utterance of a defamatory remark contained in film, all of the traditional elements of libel are present: the visual aspect and recordation in such permanent form as will give the film a true possibility of a wider area of dissemination and therefore a greater potentiality for harm. In the application of the law of defamation to the motion picture industry, the leading case is *Youssoupoff v. Metro-Goldwyn-Mayer Pictures, Inc.*[55] It was there held that defamation, published through the use of the screen and recorded sound track was libelous. Judge Slesser stated:

> There can be no doubt that, so far as the photographic part of the exhibition is concerned, that is a permanent matter to be seen by the eye and is the proper subject of an action for libel, if defamatory. I regard the speech which is synchronized with the photographic reproduction and forms part of one complex, common exhibition as an ancillary circumstance, part of the surroundings explaining that which is seen.[56]

In *Merle v. Sociological Research Film Corp.*,[57] the court, recognizing the novelty of the action, concluded that when such a publication brings a person into disrepute, the showing of the film constitutes libel. This decision was followed in a 1934 case[58] wherein it was stated in the majority opinion that: "We are told that many of the scenes which upon the screen appear to be real are produced artificially and by illusion. Such a production may be libelous. In the hands of a wrongdoer these devices have untold possibilities toward producing an effective libel. . . ."

It would seem that the motion picture analogy is the most useful of the various parallels drawn by the courts as far as television defamation is concerned. The only difficulty experienced is the permanency test. Of course, that problem is resolved in favor of libel if the program happens to be one that is filmed or "taped."[59]

III. The Problem

The problem of the ad-lib defamatory statement, however, cannot be solved by supposition. A "live" television program with a digression from the prepared script was the subject of the case of *Shor v.*

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[55]50 T.L.R. 581 (C.A. 1934).

[56]Youssoupoff v. Metro-Goldwyn-Mayer Pictures, Inc., 50 T.L.R. 581 (C.A. 1934), 99 A.L.R. 864, 875.

[57]166 App. Div. 376, 152 N.Y. Supp. 829 (1915).

[58]Brown v. Paramount Publix Corp., 240 App. Div. 520, 270 N.Y. Supp. 544 (1934).

[59]See Note, *supra* note 52, at 73.

Billingsley.[60] The plaintiff brought an action for defamation but did not allege or prove any special damages. The action was based on the extemporaneous defamatory remarks made by the defendant on television. The court held that the action would lie without allegation or proof of special damages because such a publication constitutes libel and not slander.

The situation present in *Shor v. Billingsley* is indeed a controversial one. From an examination of the cases, it is elemental that slander is defamation which is perceived through the audio senses, while that which is perceived through the optical senses is libel. Libel has been held to include defamation by signs,[61] pictures,[62] cartoons,[63] statues,[64] motion pictures,[65] hanging one in effigy,[66] a bank dishonoring a valid check drawn on it,[67] and by following one in such an obvious fashion as to make it clear that he is suspect.[68] All of these cases are examples of the disagreement of many courts with Justice Cardozo's often quoted statement that "What gives the sting to the writing is its permanence. The spoken word dissolves, but the written one abides and 'perpetuates the scandal.' "[69] However, in the case in question that which was *seen* by the audience did not appear to contribute to the defamatory character of the remark at all. The remark alone would have been purely slanderous. It is urged, therefore, that if the visual portion had contributed to the defamation, the court would have had no difficulty following the line of cases involving defamatory conduct,[70] and would not have had to abandon the traditional audio-visual distinction. However, since such was not the fact, the court adopted an extension of the "capacity for harm" theory and expressly accepted the concurring opinion of Judge Fuld in *Hartmann v. Winchell*[71] who said: "If considerations of principle are to control, there is no valid reason why the

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[60]4 Misc. 2d 847, 158 N.Y.S.2d 476 (Sup. Ct. 1957).

[61]See Tarpley v. Blabey, 1836, 2 Bing. N.C. 437.

[62]See, *e.g.*, Burton v. Crowell Pub. Co., 82 F.2d 154 (2d Cir. 1936).

[63]See Brown v. Harrington, 208 Mass. 600, 95 N.E. 655 (1911).

[64]Monson v. Tussauds, [1894] 1 Q.B. 671 (C.A.).

[65]Merle v. Sociological Research Film Corp., 166 App. Div. 376, 152 N.Y. Supp. 829 (1915).

[66]Johnson v. Commonwealth, 14 Atl. 425 (1888).

[67]Cox v. National Loan and Exchange Bank, 138 S.C. 381, 136 S.E. 637 (1927). *Contra*, Svendsen v. State Bank, 64 Minn. 40, 65 N.W. 1086 (1896).

[68]Schultz v. Frankfort Marine, Accident and Plate Glass Ins. Co., 151 Wis. 537, 139 N.W. 386 (1913).

[69]Ostrowe v. Lee, 256 N.Y. 36, 39, 175 N.E. 505, 506 (1931).

[70]71 HARV. L. REV. 384 (1954).

[71]Shor. v. Billingsley, 4 Misc.2d 857, 158 N.Y.S.2d 476, 480 (Sup. Ct. 1957).

same consequences should not attach to publication through the medium of radio broadcasting as flow from publication through the medium of writing."[72]

And the court also quoted with approval from a leading legal writer on defamation, whose conclusion concerning the defamatory radio speech was:

> It is the voice which carries his words to millions. He speaks with prepared deliberation, and to a vast, if uncountable audience. To them his words are still unrecorded. Even here the words eagerly awaited with radio acquisitiveness, may leave a record as permanent as if the eye had seen the printed page. The rules of libel and not slander should apply.[73]

If the foregoing can be accepted as true, does it not follow that defamation on the television, whether or not the visual aspect contributes to the defamation, should receive the same treatment? However, a contrary result has been indicated when the statement was published on television.[74] The court insisted that unless the "age-old difference" between libel and slander is to be destroyed, then the audio-visual distinction must be retained. The court did, however, accept the analogy between radio and television as applied to defamation broadcast from a written manuscript but was inclined to follow the rationale of the New York court in *Locke v. Gibbons*:[75]

> The broadcasting over the radio of an extemporaneous speech is no different in principle from the delivery of the same speech over an amplifier to a vast audience in a stadium. Both methods involve use of the spoken word, and if the utterances are defamatory, they may be equally damaging in nature. The extent of the damage might obviously depend upon the number of persons hearing the defamation in either case.

The court in *Shor v. Billingsley*,[76] however, avoided the application of that same passage when it said that the use of the amplifier falls so "inescapably" into the concept of slander that "abolition of the line between libel and slander . . . would be too extreme a break with the past to be achieved without legislation."[77] Assuming the truth of this last statement, it necessarily follows that the court is not abolishing the distinction between libel and slander but is merely extending it to include the televised extemporaneous defamatory statement. Judge Hecht argues that this is not a change of the existing law but an adaptation of the recognized common law relief granted to an injured plain-

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[72]296 N.Y. 296, 306, 73 N.E.2d 30, 34 (1947).

[73]Shor v. Billingsley, 4 Misc.2d 857, 158 N.Y.S.2d 476, 481 (Sup. Ct. 1957).

[74]Remington v. Bentley, 88 F. Supp. 166 (S.D.N.Y. 1949).

[75]164 Misc. 877, 299 N.Y. Supp. 188 (1937).

[76]Shor v. Billingsley, 4 Misc.2d 857, 158 N.Y.S.2d 476, 483 (Sup. Ct. 1957).

[77]Hartmann v. Winchell, 296 N.Y. 296, 73 N.E.2d 30 (1947).

tiff where the potentiality for harm is great since that potentiality does go to the heart of the action and this test arose to protect against injury to one's reputation.[78] Secondly, he argues, in the face of quite an array of authority, that it is the place and the duty of the common law courts to "adapt and alter decisional law to produce common sense justice."[79] It is the genius of the common law to meet novel actions.

> The common law is not rigid and inflexible, a thing dead to all surrounding and changing conditions, it does expand with reason. The common law is not a compendium of mechanical rules, written in fixed and indelible characters, but a living organism which grows and moves in response to the larger and fuller development of the nation.[80]

And in application to the particular issue at hand, Judge Fuld, in his concurring opinion in *Hartmann v. Winchell*[81] stated: "It is . . . the function of the courts, when called upon to determine which of two competing standards of liability shall be applied in a novel situation, to re-examine and reapply the old rules and to give them a new content in the light of underlying vital principles."

Research does not reveal any other cases that have been decided on the extemporaneous television statement. However, there have been several recent cases concerning a defamatory remark read from a prepared script.[82] One of these cases admits the proposition as well settled that broadcasting by reading defamatory statements from a written script constitutes the publication of libel rather than slander.[83] In *Landau v. Columbia Broadcasting Co.*,[84] the court, in concluding that the alleged defamation would not be reasonably understood to apply to the plaintiff, intimated that if such a statement had been defamatory, libel would have been the proper remedy.

IV. Legislation Governing Television Defamation

State legislatures have entered the arena of confusion of televised defamation. As should be expected of attempts to reconcile the inconsistencies that have evolved, there has been no uniform resolution of the problems. The legislative attempts are not directed at the question of how to impose liability but upon whom it should not be rested. Almost unanimously, the states have, through one technique or the

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[78]Note, 43 Cornell L. Q. 320, 326 (1957).

[79]Shor v. Billingsley, 4 Misc. 2d 857, 158 N.Y.S.2d 476, 486 (Sup. Ct. 1957).

[80]*Id.* at 485.

[81]296 N.Y. 296, 301, 73 N.E.2d 30, 33.

[82]Gibler v. Houston Post Co., 310 S.W.2d 377 (Tex. Civ. App. 1958); Gearhart v. WSAZ, 150 F. Supp. 98 (E.D. Ky. 1957); Landau v. Columbia Broadcasting Co., 205 Misc. 357, 128 N.Y.S.2d 254 (1954).

[83]Gibler v. Houston Post Co., *supra* note 82, at 385.

[84]205 Misc. 357, 128 N.Y.S.2d 254 (1954).

other, absolved or at least lessened the liability of the television station, its owner, operators and employees.

The most widely used language is that of "due care." The statutes generally absolve the owner or licensee and agents of either from all liability for damages for a defamatory statement published on the television broadcast by one other than the above unless failure to use due care is proved.[85] Typical of such statutes was one enacted by the New Mexico legislature:

> The owner, licensee or operator of a visual or sound radio broadcasting station or network of stations, and the agents or employees of any such owner, licensee or operator, shall not be liable for any damages for any defamatory statement published or uttered in or as a part of a visual or sound radio broadcast, by one other than such owner, licensee or operator, or agent or employee thereof, unless it shall be alleged and proved by the complaining party that such owner, licensee, operator, or such agent or employee, has failed to exercise *due care* (emphasis mine) to prevent the publication or utterance of such statement in such broadcast. Provided, however, the exercise of due care shall be construed to include a bona fide compliance with any federal law, or the regulation of any federal regulatory agency, including those laws and regulations fixing the rates that may be charged for use of such facilities for visual or sound broadcasts.[86]

It is interesting to note that the last sentence of the section was included primarily to comply with the federal law[87] which provides that any licensee permitting the use of its facilities by any legally qualified candidate for public office shall afford all such candidates for the same office "equal opportunity" in the use of the same facilities. Such licensee shall not have any power of censorship of material so broadcast. Several states, in the adoption of statutes limiting the liability of station owners and operators, incorporated recognition of that federal

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[85]ARIZ. REV. STAT. ANN. § 12-652 (1956); CAL. CIV. CODE § 48.5 (1954); COLO. REV. STAT. ANN. § 41-2-6 (1953); FLA. STAT. ANN. § 770.04 (Supp. 1960); GA. CODE ANN. § 105-712 (1956); IDAHO CODE ANN. § 6-701 (Supp. 1959); IND. STAT. ANN. § 2-518 (1946); KAN. GEN. STAT. ANN. § 60-746 (A) (1949); LA. REV. STAT. § 45:1351 (1950); ME. REV. STAT. ANN. Ch. 130 § 32 (1954); MD. ANN. CODE Art. 75 § 6 (1957); MICH. STAT. ANN. § 12.1405 (Supp. 1959); MINN. STAT. ANN. § 544.043 (Supp. 1960); MISS. CODE ANN. § 1059.5 (1956); NEV. REV. STAT. § 41.340 (1959); N. H. REV. STAT. ANN. § 507-A:1 (Supp. 1961); N. M. STAT. ANN. § 40-27-35 (Supp. 1959); N. C. GEN. STAT. § 99-5 (1958); OHIO REV. CODE ANN. § 2739.03 (Page 1953); OKLA. STAT. ANN. tit. 12, 1447.1 (1951); ORE. REV. STAT. § 30.150 (1957); S. D. CODE § 47.0506 (1939); TENN. CODE ANN. § 23-2606 (Supp. 1960); TEX. REV. CIV. STAT. Art. 5433a (1948); UTAH CODE ANN. § 45-2-5 (1953); VA. CODE ANN. § 8-632.1 (1950); WASH. REV. CODE § 19.64.010 (1958); W. VA. CODE ANN. § 5482 (1) (1955); WIS. STAT. ANN. 331.052 (1958); WYO. STAT ANN. § 1-872 (1957).

[86]N. M. STAT. ANN. § 40-27-35 (Supp. 1959).

[87]47 U.S.C.A. § 315 (Supp. 1960).

statute into their state laws.[88] A few other states have apparently limited the station owner's or operator's liability solely to the situation where he is required to give equal time to candidates for public office with no power of censorship.[89] At least one state has gone so far as to eliminate the liability of the owner, operator or licensee of the television station without even imposing a due care responsibility upon such owner, operator or licensee.

> The owner, licensee or operator of a visual or sound radio broadcasting station or network of stations, and the agents or employees of any such owner, licensee or operator, shall not be liable for any damages for any defamatory statement published or uttered in or as a part of a visual or sound radio broadcast, by one other than such owner, licensee or operator, or agent or employee thereof.[90]

It is seen, then, that there are two primary, opposing positions to which the legislation has proceeded: due care and exemption from liability. The remainder of the states fall between these extremes and utilize varying approaches to mitigate the liability of the broadcasting company. At least three states make allowance for a retraction within a reasonable time after the injurious statement was uttered and in the same circumstances apparently intending to reach substantially the same audience.[91] These statutes operate to limit recovery against the broadcasting company to actual damages where the station has published a retraction or correction within the period allowed by the statute.[92] A few states expressed legislative sanction for no recovery unless the complaining party can show actual malice on the part of the broadcasting station.[93] Therefore, it would seem that since intent is essential to malice and since malice can be implied from gross negligence, then the require-

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[88]CAL. CIV. CODE § 48.5 (1954); COLO. REV. STAT. ANN. § 41-2-6 (1953); FLA. STAT. ANN. § 770.04 (Supp. 1960); KAN. GEN. STAT. ANN. § 60-746(A) (1949); LA. REV. STAT. § 45.1351 (1950); ME. REV. STAT. ANN. Ch. 130 § 32 (1954); MICH. STAT. ANN. § 12.1406 (Supp. 1959); MISS. CODE ANN. § 1059.5 (1956); NEV. REV. STAT. § 41.360 (1957); N. H. REV. STAT. ANN. § 507-A:2 (Supp. 1961); N. M. *Stat. Ann.* § 40-27-35 (Supp. 1959); OHIO REV. CODE ANN. § 2739.03 (Page 1953); OKLA. STAT. ANN. tit. 12, § 1447.2 (1951); ORE. REV. STAT. § 30.150 (1957); TENN. CODE ANN. § 23-2607 (Supp. 1960); UTAH CODE ANN. § 45-2-5 (1953); VA. CODE ANN. § 8-632.1 (1950); W. VA. CODE ANN. § 5482(1) (1955); WIS. STAT. ANN. 331.052 (1958); WYO. STAT. ANN. § 1-873 (1957).

[89]CONN. GEN. STAT. ANN. § 52-239 (1959); HAWAII REV. LAWS § 294-11 (1955); MASS. GEN. LAWS ANN. Ch. 231, § 91A (Supp. 1960); MO. ANN. STAT. 537.105 (1949); N. J. STAT. ANN. § 2A:43-3 (Supp. 1960); N. Y. CIV. PRAC. ACT. § 337-A; PA. STAT. ANN. tit 12, § 1585 (Supp. 1960); S. C. CODE § 23-7 (Supp. 1960).

[90]N. D. REV. CODE § 14-0209 (Supp. 1957).

[91]IND. ANN. STAT. § 2-518 (1946); KY. REV. STAT. ANN. § 411.061 (1960); ORE. REV. STAT. § 30.165 (1957)

[92]*E.g.*, MONT. REV. CODES ANN. § 64-207.1 (Supp. 1961).

[93]*E.g.*, MONT. REV. CODES ANN. § 64.205 (1947); UTAH CODE ANN. § 45-2-5 (1953).

ment that malice must be shown is a stricter application of the due care rule. Still other states, recognizing the due care rule, allow recovery of actual damages only.[94] One state predicates recovery of anything more than special damages on the failure of the broadcasting company to make a "conspicuous and timely publication" of a retraction or correction.[95]

The Uniform Single Publications Act has begun to gain recognition in order to preclude a multiplicity of suits resulting from the publication of defamatory utterances originating at one station in a network of stations.[96] The following statute is typical.

> No person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as any one edition of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture. Recovery in any action shall include all damages for any such tort suffered by the plaintiff in all jurisdictions.[97]

V. Conclusion

The distinctions in the law of defamation between libel and slander have long out-lived their usefulness. At one time there was obvious purpose in the ease with which a plaintiff could recover in a libel action —the published libel was ordinarily more lasting, therefore reaching more people. As was pointed out earlier,[98] the fact that a defamatory utterance is written should not be considered the distinguishing factor in an action for libel, but the capacity of the writing for harm, its area of dissemination. Simply because writing was the only existent mode through which the courts of the day felt justified in requiring less proof does not indicate that such is true today in an age of instantaneous communication to more people than were existent in the day of the common law development of these archaic distinctions.

The complaint is not with the distinctions themselves but with the rigidity of today's application of them. It is submitted that the solution will not be found in judicial abolition of the distinction. "Abolition of the line between libel and slander would . . . be too extreme a break with the past to be achieved without legislation."[99] The most logical

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[94]Wyo. Stat. Ann. § 1-874 (1957).

[95]Ky. Rev. Stat. Ann. § 411.061 (Supp. 1960).

[96]*E.g.*, Idaho Code Ann. § 6-702 (Supp. 1959); Ill. Ann. Stat. Ch. 126, § 11 (Smith-Hurd 1960).

[97]N. D. Rev. Code § 14-0209 (Supp. 1957).

[98]*Supra* note 18 and accompanying text.

[99]Hartmann v. Winchell, 296 N.Y. 296, 301, 73 N.E.2d 30, 32 (1947) (Concurring opinion).

approach was taken in *Shor v. Billingsley*[100]—simply extend liability for libel beyond the traditional writing requirement based on a " . . . frank recognition that sound policy requires such a result. . . ."[101]

Again, although criticized, damage to one's reputation is the gist of an action for defamation. In common sense, can it ever be said that an extemporaneous remark made on television resulting in untold injury to an innocent party is not actionable because it was not written before uttered? The absurdity mounts when it is recognized that the audience has no idea whether the statement has been written. How could that fact lessen the damage? An oral extemporaneous statement uttered on the radio or television should be actionable as a libel thereby dispensing with the requirement of proof of special or actual damages.

Lucien C. Gwin, Jr.

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[100]4 Misc.2d 857, 158 N.Y.S.2d 476 (Supp. Ct. 1957).

[101]Hartmann v. Winchell, 296 N.Y. 296, 302, 73 N.E.2d 30, 33 (1947) (Concurring opinion).

RECENT DECISIONS

Constitutional Law—Belief in Existence of God as a Test for Office

Appellant Torcaso, who had been appointed to the office of Notary Public by the Governor of Maryland, unsuccessfully brought this action for mandamus in the Maryland courts to compel the issuance of his Notary Public commission which had been denied because of his failure to declare his belief in the existence of God by oath as required by the Maryland constitution. Basis of Torcaso's action was that the requirement violated article VI and the first and fourth amendments of the United States Constitution. Held: Reversed. The provision of the Maryland constitution requiring declaration of belief in God as a requirement for holding office violates the first and fourteenth amendments of the Constitution. *Torcaso v. Watkins*, 81 Sup. Ct. 1680 (1961).

"We are a religious people whose institutions presuppose a Supreme Being."[1] The preceding statement by Justice Douglas helps explain why there have been very few cases concerning the validity of religious test oaths as a requirement for holding public office. The Constitution specifically provides that ". . . no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States,"[2] but the United States Supreme Court has avoided ruling whether this provision is applicable to the states.[3] Consequently, some states, including Mississippi, have religious test provisions in their constitutions.[4] The *Torcaso* opinion will necessitate a change in these state constitutions, and the question has arisen as to the impact of this decision upon the various uses of the oath.

At common law a person could not take a valid oath unless he believed in the existence of a God[5] and was under an immediate sense of responsibility to this God who would punish him if he swore falsely.[6] Mr. Justice Story's comment in 1827 illustrates the association of the oath with religion: "The administration of an oath supposes that a moral and religious accountibility is felt to a Supreme Being. . . ."[7] Since Story's time when few atheists were allowed to testify because of their failure to feel religious accountibility,[8] the concept of the oath has changed and many states have passed statutes recognizing that atheists can be competent witnesses.[9] Thus, defined in its broadest sense, ". . . an oath is any form of attestation by which a person signifies that he is bound in conscience to perform an act faithfully and truthfully."[10]

It is submitted that the *Torcaso* opinion will have no effect whatsoever upon references to the Almighty such as "So help me God"

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[1]Zorach v. Clauson, 343 U.S. 306, 313 (1952).

[2]U. S. Const. art. VI, cl. 3.

[3]See Torcaso v. Watkins, 81 Sup. Ct. 1680 (1961).

[4]*E.g.*, Miss. Const. art. 14, § 265.

[5]*E.g.*, *In re* Breidt, 84 N. J. Eq. 222, 94 Atl. 214 (Ch. 1915).

[6]*E.g.*, Atwood v. State, 146 Miss. 662, 111 So. 865 (1927).

[7]Wakefield v. Ross, 28 Fed. Cas. 1346 (No. 17,050) (C.C. R.I. 1827).

[8]See 1 Greenleaf, Evidence § 368 (12th ed. 1866).

[9]See Annot., 42 L.R.A. 553 (1899) and Annot., 23 L.R.A. (n.s.) 1023 (1910).

[10]State *ex rel.* Braley v. Gay, 59 Minn. 6, 60 N.W. 676 (1894).

found in various official oaths.[11] Torcaso was willing to take the oath prescribed by the Maryland constitution;[12] and since his complaint was against declaring a belief in God, one can infer that the Court was concerning itself only with religious test oaths and that it did not intend for its decision to affect our common oaths. Support for this inference can be found in a statement made within the past decade when the Court was faced with defining the border between state and religion. Then the Court forcefully rejected an argument based upon the first amendment, asserting that not only would the proposed interpretation go so far as to make church and state hostile to each other, but that such common occurrences as prayers in our legislative bodies, the President's references to the Almighty in his messages or proclamations, ". . . 'so help me God' in our courtroom oaths—these and other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the first amendment."[13]

Arguments can be made against the *Torcaso* decision. One such argument is the Court's statement in an early, well known case concerning the powers of state and federal governments, that although the oath of fidelity to the Constitution is prescribed, "yet, he would be charged with insanity who should contend that the legislature might not superadd to the oath directed by the Constitution such other oath of office as its wisdom might suggest."[14] But regardless of personal opinions as to the validity of the decision, it is submitted that there will be no great change in the election of public officials. The will of the people will be expressed through each individual's power to vote; and the will of the majority will reflect the thoughts of the people concerning the religious beliefs of public officials.

James Kearney Travis, Jr.

Constitutional Law—Communist Party Membership—Criminal Convictions Upheld

Petitioner, an official of the Communist Party, was convicted under the membership clause of the Smith Act[1] for knowing membership in an organization which advocates the overthrow of the Government by force. Petitioner asserted that the membership clause was repealed pro tanto by section 4(f) of the Internal Security Act of 1950;[2] that conviction violates political expression and association under the free-speech and assembly guarantees of the first amendment and violates due process of the fifth amendment. Held: Affirmed. Active, purposeful membership in an organization which advocates violent overthrow of Government is not protected by the Constitution; prosecution therefor

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[11] Rev. Stat. § 1757 (1875), 5 U.S.C. § 16 (1958).

[12] Torcaso v. Watkins, 223 Md. 49, 162 A.2d 438 (1960).

[13] Zorach v. Clauson, 343 U.S. 306, 313 (1952).

[14] McCulloch v. Maryland, 4 U.S. (4 Wheat.) 415, 427 (1819).

[1] 18 U.S.C. § 2385 (1958).

[2] 64 Stat. 991 (1950), 50 U.S.C. § 783f (1958).

is not barred by section 4(f), Internal Security Act.[3] *Scales v. United States*, 81 Sup. Ct. 1469 (1961) (5-to-4 decision).

The constitutional protections asserted have been repeatedly held not absolute;[4] rather, when federal or state governments can show a justifiable interest, the court will "balance" the interests of the individual and the government, often to the sacrifice of the former.[5] The government's self-preservation is the object sought in controlling advocates of violent overthrow[6] and, to the majority of the present court, use of certain means to that end is clearly justifiable.[7] The cases in this general area involve governmental actions such as legislative inquiries,[8] discharge of employees,[9] deportation[10] and denaturalization,[11] and registration requirements.[12] Criminal prosecution for conspiracy and active, knowing membership are perhaps the ultimate in self-preservation measures, and the Government must meet rigid evidentiary standards in showing "advocacy" and "conspiracy" or "membership."[13]

Prosecution by a state is barred where the Federal Government is the proposed victim of illegal advocacy because Congress has preempted the field,[14] but where the state itself is threatened, the state may act.[15] Such a state prosecution should meet the same standards required in the principal case because of the likelihood of review by the United States Supreme Court. A valid conviction requires sufficient evidence of present advocacy of present or future violent overthrow, accompanied by specific intent to accomplish violent overthrow when circumstances are propitious. It also requires active, purposeful, and knowing membership as opposed to nominal or passive membership.[16] There are various Mississippi statutes in the area of treason or subversion,[17] but there are apparently no reported cases involving those statutes. One statutory definition of "subversive person" contains a membership clause,[18] and another statute provides direct criminal penalties for violent overthrow where there has been an actual commission, a

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[3] *Ibid.*

[4] See, *e.g.*, Dennis v. United States, 341 U.S. 494 (1951).

[5] See, *e.g.*, Barenblatt v. United States, 360 U.S. 109 (1959).

[6] See, *e.g.*, Dennis v. United States, 341 U.S. 494 (1951).

[7] See, *e.g.*, Scales v. United States, 81 Sup. Ct. 1469 (1961).

[8] See, *e.g.*, Barenblatt v. United States, 360 U.S. 109 (1959).

[9] See, *e.g.*, Slochower v. Board of Higher Education, 350 U.S. 551 (1956); *but see* Nelson v. Los Angeles, 362 U.S. 1 (1960).

[10] See, *e.g.*, Galvan v. Press, 347 U.S. 522 (1954).

[11] See, *e.g.*, Schneiderman v. United States, 320 U.S. 118 (1943).

[12] See Communist Party of the United States v. Subversive Activities Control Board, 81 Sup. Ct. 1357 (1961).

[13] *Compare* Scales v. United States, 81 Sup. Ct. 1469 (1961), *with* Noto v. United States, 81 Sup. Ct. 1517 (1961). *Compare* Dennis v. United States, 341 U.S. 494 (1951), *with* Yates v. United States, 354 U.S. 298 (1957).

[14] Pennsylvania v. Nelson, 350 U.S. 497 (1956).

[15] Uphaus v. Wyman, 360 U.S. 72 (1959).

[16] *Compare* Scales v. United States, 81 Sup. Ct. 1469 (1961), *with* Noto v. United States, 81 Sup. Ct. 1517 (1961).

[17] See MISS. CODE ANN. §§ 2397-2401 (treason) and §§ 4064-01 to -13 (subversion) (1956); see also §§ 4194-01 to -10 (powers of Attorney General) (Supp. 1960).

[18] MISS. CODE ANN. § 4064-01 (1956).

conspiracy, or personal advocacy;[19] but there is a "clear and present danger" requirement in the advocacy clause.[20] There is no direct criminal provision analogous to the Smith Act for membership in an illegal-advocacy organization.

It is submitted that the majority was correct in upholding the conviction, because the evidence showed purposeful, active, and continued effort in the Party's program of illegal advocacy.[21] Probably, a conviction could be valid where there was even less personal effort. As to whether "political freedom" has been invaded, the sponsoring of violence is simply inconsistent with the term "political." It is believed that our state laws, at present, could not support a membership conviction and that our "clear and present danger" requirement is outmoded in the violent overthrow field.[22] The enactment of a statute analogous to the Smith Act is recommended.

John M. Roach

Constitutional Law—Evidence Obtained by Unreasonable Search and Seizure Not Admissible in State Courts

Officers of the state forcibly entered the premises of the appellant, apparently without a search warrant, pursuant to information that someone was hiding there who was wanted for questioning in connection with a recent bombing and that there was a large amount of policy paraphernalia being hidden in the home. In the course of the search of the apartment the officers discovered the obscene materials for possession of which the appellant was ultimately convicted. Held: Reversed. Evidence obtained by unreasonable search and seizure is not admissible in state courts. *Mapp v. Ohio.* 81 Sup. Ct. 1684 (1961).

The doctrine of non-exclusion had never been doubted until *Boyd v. United States*[1] was decided in 1886. Prior to that time it had long been established that admissibility of evidence was not affected by the illegality of the means through which it had been obtained.[2] In the *Boyd* case, reversal was clearly correct on fifth amendment grounds,[3] but the court went further. Among the loosely flung dicta in *Boyd* was the assertion that evidence obtained in violation of the fourth amendment is inadmissible in evidence.[4] This was a clear contradiction of a long established principle[5] and was virtually repudiated less

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[19] Miss. Code Ann. § 4064-10 (1956).

[20] *Ibid.*

[21] See Scales v. United States, 81 Supp. Ct. 1469, 1487 (1961).

[22] See Dennis v. United States, 341 U.S. 494 (1951).

[1] 116 U.S. 616 (1886).

[2] See, *e.g.*, Commonwealth v. Dana, 43 Mass. (2 Met.) 329 (1841). See also Olmstead v. United States, 277 U.S. 438, 467 (1927).

[3] 8 Wigmore, Evidence § 2184a (4th ed. 1960).

[4] 116 U.S. 616, 633 (1886).

[5] See, *e.g.*, Commonwealth v. Dana, 43 Mass. (2 Met.) 329 (1841). See also Olmstead v. United States, 277 U.S. 438, 467 (1927).

than two decades later.[6] *Weeks v. United States*[7] established the present federal rule of exclusion and was based largely on the fallacious dictum of *Boyd*. The state courts had always determined their own rules on admissibility of evidence until an inroad was made just twelve years ago by *Wolf v. Colorado*,[8] which established the principle that evidence obtained by means which are violative of the fundamental concept of due process is inadmissible in state courts. At the same time *Wolf* made clear that only that part of the fourth amendment which is encompassed by the due process clause of the fourteenth amendment was made applicable to the states.[9]

The *Mapp* case sets forth several reasons for overruling *Wolf*, including the following: first, the factual considerations supporting the 1949 case cannot now be deemed to control; second, the right to privacy, a right as fundamental as those of the first amendment, must be enforced by the states through exclusion just as it is by the Federal Government; third, the fourth and fifth amendments are complementary so that the same rule which is applicable to coerced confessions should be applicable to illegally obtained evidence.[10] These arguments are not convincing. One of the facts which the Court said could no longer be deemed as controlling was that of relegating the fourth amendment to the protection of other remedies.[11] Aside from the fact that the issue is one of constitutional power of the states and not one of desirability,[12] it has not been shown that police practices are significantly improved by the exclusionary rule.[13] In fact, the tendency seems to be, in the states that adhere to the federal rule, to soften constitutional requirements so as to either broaden the concept of reasonable search or to narrow the group of persons with standing to complain.[14] Next, admitting for the purpose of argument that the *Weeks* rule is of constitutional origin rather than one derived from the supervisory power of the Supreme Court over the federal judicial system,[15] it does not follow as a matter of logic that exclusion in state courts is made mandatory by the Constitution. *Wolf* and subsequent decisions[16] made clear that only the *core* of the fourth amendment, that which is "implicit in the concept of ordered liberty,"[17] is incorporated in the due process clause of the fourteenth amendment. Finally, the third argument is specious,

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[6]Adams v. New York, 192 U.S. 585 (1904).

[7]232 U.S. 383 (1914).

[8]338 U.S. 25 (1949).

[9]*Id.* at 27.

[10]Mapp v. Ohio, 81 Sup. Ct. 1684, 1689, 1691, 1692 (1961).

[11]*Id.* at 1690.

[12]*Id.* at 1705.

[13]See Irvine v. California, 347 U.S. 128, 135-36 (1954). See also Note, *The State Exclusionary Rule as a Deterrent Against Unreasonable Search and Seizure*, 47 NW. U.L. REV. 493 (1952).

[14]8 WIGMORE, EVIDENCE § 2184a (4th ed. 1960).

[15]See Mapp v. Ohio, 81 Sup. Ct. 1684, 1704 (1961), where Justice Harlan states that he entertains "considerable doubt as to the soundness of this fundamental proposition of the majority. . . ." *Cf.* Elkins v. United States, 364 U.S. 206, 216 (1960).

[16]See, *e.g.*, Irvine v. California, 347 U.S. 128, 132 (1954).

[17]See Palko v. Connecticut, 302 U.S. 319, 325 (1937), which first stated this formula designed to describe the scope of the due process clause of the fourteenth amendment.

for in the state coerced confession cases, the issue turns on the fairness or reasonableness of the use of such confession in evidence,[18] whereas the exclusionary rule is designed as a deterrent to illegal police practices[19] and points to the means by which the evidence was obtained, which is relevant only as it bears on the constitutional issue in the former class of cases.[20] To say that the fourth and fifth amendments are complementary so as to support the proposition that the remedy for the invasion of rights protected by one must be the remedy for the invasion of rights protected by the other is to beg the issue and is nowhere supported by authority.[21]

Despite the irrefutable arguments in prior cases that the drafters of the fourteenth amendment never intended that all of the first eight amendments be made applicable to the states,[22] and, more specifically, that the fourth amendment be made applicable to the states,[23] the latter has become virtually incorporated in the fourteenth amendment as a consequence of this decision.[24] *Wolf's* declaration that the issue is closed as to the automatic incorporation of the first eight amendments in the due process clause of the fourteenth will probably be heeded only a short while longer than the basic principle which it established.

Lucius Featherson Sams, Jr.

Constitutional Law—Federal Escheat Statute Under the War Power

Adam Warpousky, a mentally incompetent war veteran, was delivered involuntarily to a Veterans' Administration hospital on March 1, 1956. He remained there, incompetent to contract,[1] until his death on March 19, 1956, leaving an estate composed of personal property worth about $13,000, which he had inherited from his brother. Under an Oregon statute his estate would escheat to the state.[2] Under federal statute, when a veteran dies in a veterans' hospital without a will or legal heirs, his personal property would "immediately vest in and become the property of the United States as trustee for the sole use and benefit of the General Post Fund. . . ."[3] Held: Reversed. The federal statute under which the property would go to the United States does not require a contract and does not violate the tenth amendment, nor does mental incompetency of the veteran preclude

[18]See, *e.g.*, Leyra v. Denno, 347 U.S. 556 (1954).

[19]See, *e.g.*, Elkins v. United States, 364 U.S. 206, 217 (1960).

[20]Lisenba v. California, 314 U.S. 219, 235 (1941).

[21]See Mapp v. Ohio, 81 Sup. Ct. 1684, 1692 (1961), where the majority supports its deduction by quoting scattered phrases and clauses from other cases which in sum say that both amendments protect personal rights.

[22]See, *e.g.*, Bartkus v. Illinois, 359 U.S. 121 (1959).

[23]See, *e.g.*, Wolf v. Colorado, 338 U.S. 25 (1949).

[24]*Cf.* Mapp v. Ohio, 81 Sup. Ct. 1684, 1708 (1961).

[1]*In re* Warpousky's Estate, 352 F.2d 539 (Ore. 1960).

[2]Ore. Rev. Stat. § 120.010 (1953).

[3]38 U.S.C. § 5220(a) (1958).

his property from passing to the Federal Government rather than to the state government under Oregon escheat law. *United States v. Oregon*, 81 Sup. Ct. 1278 (1961).

The federal statute[4] was originally couched in terms of contract and included a presumption of a valid contract between the entrant-veteran and the hospital as a condition precedent to his entry.[5] Earlier cases[6] of incompetent entrants who died without will or heirs were limited to situations where the entrant's personal property consisted of "benefits payable under laws administered by the Veterans' Administration . . . which would escheat to the state." There the Federal Government claimed a "reversionary" interest in the funds under a separate statute.[7] Where the entrant was competent and had personal property derived from federal or nonfederal sources, courts had no trouble upholding the validity of the contract theory "under the federal common law"[8] and allowing the government to take.[9] Where the competent entrant had both real and personal property, the Federal Government, acting under the contract theory, took only the personal property, the real property escheating to the state of domicile.[10] Administration of the veteran's estate is not necessary, for it has been held[11] that the provisions of the statute are self-executing, vesting the property in the Administrator of Veterans Affairs.

In 1941 the statute was amended so as to allow the Federal Government to take regardless of the presumption of contract.[12] Despite contrary legislative history,[13] the Court held in the instant case that the statute allows the Federal Government to take an insane entrant's personal property. The rationale is Congress' delegated power to declare and conduct[14] war, this escheat statute being considered a necessary incident to the war power. Although escheat is normally left to the states,[15] it is not reserved under the tenth amendment, for "the Tenth Amendment does not deprive 'the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end.' "[16]

The full scope of the war power was demonstrated during the Civil War when Congress passed an act tolling the running of the statute of limitations in cases where service of process was made impossible because of hostilities.[17] In 1870 the Court held this act constitutional

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[4]*Ibid.*

[5]Pensions, Bonuses, and Veteran's Relief Act of June 25, 1910, ch. 384, § 1. 36 Stat. 736.

[6]See, *e.g.*, *In re* Skriziszouski's Estate, 382 Pa. 634, 116 A.2d 841 (1955).

[7]38 U.S.C. § 3202 (e) (1958).

[8]United States v. Essex Trust Co., 44 F. Supp. 476 (D. Mass. 1942).

[9] See, *e.g.*, United States v. Stevens, 302 U.S. 623 (1938).

[10]See, *e.g.*, *In re* Witte, 174 Kan. 360, 255 P.2d 1039 (1953).

[11]See, *e.g.*, United States v. Mid City Nat'l Bank of Chicago, 121 F. Supp. 402 (E.D. Ill. 1953).

[12]Act of Dec. 26, 1941, ch. 634, 55 Stat. 868.

[13]87 CONG. REC. 5203-04 (1941).

[14]M'Culloch v. Maryland, 4 U.S. (4 Wheat.) 415 (1819).

[15]See, *e.g.*, Mager v. Grima, 17 U.S. (8 How.) 667 (1849).

[16]Oklahoma v. Guy F. Atkinson Co., 313 U.S. 508, 534 (1941).

[17]Act of June 11, 1864, ch. 118, 13 Stat. 123.

as applied to state litigation on the theory that the war power was not limited to victories in the field, but also carried with it power to remedy the evils which arose from war and its progress.[18] In 1919 the Court dealt with a war-enacted statute[19] which prohibited the sale of distilled spirits for beverage purposes and called the act a valid exercise of the war power. The Court held that when the United States exerts any of its conferred powers "no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a state of its police power, or that it may tend to accomplish a similar purpose."[20] The Housing and Rent Act of 1947,[21] a statute enacted after the end of World War II, was before the Court,[22] and it was held that the war power permitted the legislation regulating rents. A contrary result would drastically limit the necessary and proper clause as applied to the war powers.[23]

The two other major areas of power delegated to Congress by the Constitution have been similarly dealt with. The treaty power of Congress is not limited by the tenth amendment in matters concerning the states[24] nor is the commerce clause. In *United States v. Darby*,[25] the Court said the commerce clause " 'is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution'. . . . Our conclusion is unaffected by the Tenth Amendment which . . . states but a truism that all is retained which has not been surrendered."[26] Applying this language to the war power, there seems little doubt that Congress can effectively enact a valid federal escheat statute. Mr. Justice Douglas, in his dissent, asks why limit the escheat to the present situation?[27] The only answer is that Congress has seen fit to exercise its power only to this extent. Congress could probably extend the federal escheat statute to cover the real property of the veteran who dies intestate, but it seems settled[28] that if the entrant had devised his real property to the United States in a state where the United States was incapable of taking by will,[29] the devise would be void. The rule announced by the Court is that in certain situations the Federal Government may enact a valid law controlling the distribution of a decedent's estate. This seems to encroach further into a field primarily reserved to the states.[30]

Vernon L. Terrell, Jr.

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[18]Stewart v. Kahn, 78 U.S. (11 Wall.) 493 (1870).

[19]War Time Prohibition Act, ch. 212, 40 Stat. 1045 (1918).

[20]Hamilton v. Kentucky Distillers & Warehouse Co., 251 U.S. 146, 156 (1919).

[21]50 U.S.C. App. §§ 1891-1902 (1952).

[22]Woods v. Cloyd W. Miller Co., 333 U.S. 138 (1948).

[23]*Id.* at 143.

[24]See, *e.g.*, Missouri v. Holland, 252 U.S. 416 (1920).

[25]312 U.S. 100 (1941).

[26]*Id.* at 114, 123-124.

[27]81 Sup. Ct. (1961) at 1283.

[28]See, *e.g.*, *In re* Fox, 52 N.Y. 530 (1873), *aff'd. sub nom.* United States v. Fox, 94 U.S. 315 (1876).

[29]See, *e.g.*, N.Y. Deced. Est. Law § 12. See Cal. Prob. Code § 27 (to same effect prior to 1951 amendment).

[30]See, *e.g.*, Kolovart v. Oregon, 81 Sup. Ct. 922 (1961).

CONSTITUTIONAL LAW—JUSTICIABILITY

Plaintiffs, two sets of husband and wife and their physician, challenged the constitutionality under the fourteenth amendment of Connecticut statutes, which, as construed by the Connecticut Supreme Court of Errors, prohibited the use of contraceptive devices and the giving of medical advice in the use of the same. Plaintiffs claimed that conception would constitute a serious threat to the health or life of the female spouse. As a result of these statutes, these couples could not lawfully avail themselves of the "best and safest" means of avoiding pregnancy. Moreover, their physician could not lawfully offer medical advice concerning the use of contraceptives. Both parties reasoned that to do so would constitute a crime. The complainants, seeking declaratory relief, appealed to the Supreme Court of the United States. HELD: Dismissed. The record disclosed no justiciable constitutional question for lack of showing that the statutes would be enforced against the plaintiffs. *Poe v. Ullman*, 81 Sup. Ct. 1752 (1961) (5-to-4 decision).

The appellate power of the Supreme Court is expressly limited in article III of the Constitution by the restriction of its jurisdiction to cases and controversies.[1] The Supreme Court, however, has illustrated that as a matter of personal policy there are even further limitations or requisites for cases and controversies dealing with constitutional questions.[2] It is within this historical web of policy regarding justiciability that the present case ended in an unfortunate dismissal. Upon examination of this policy it is found that the Court, in its effort to avoid constitutional questions, has developed a series of rules which have been effectively applied to avoid a large part of all the constitutional questions pressed upon it for decision. For example, the Court has consistently avoided entertaining any constitutional questions in advance of the strictest necessity.[3] Other prerequisites to entertainment which have been applied are "standing,"[4] "ripeness,"[5] and "adversity."[6] The questions must be "real and substantial" rather than hypothetical or abstract.[7] The Court has refused to entertain questions considered to be "moot"[8] or "collusive."[9] And certainly, as exemplified by the noted case, the Court has ruled on numerous occasions that a party challenging the validity of a statute must show ". . . that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement. . . ."[10]

In an earlier case of significance concerning the Connecticut Contraceptive Statute, the Supreme Court dismissed a physician's complaint on the ground that the physician had no standing to litigate the consti-

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[1]Muskrat v. United States, 219 U.S. 346 (1911).

[2]See Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 341, 346 (concurring opinion) (1936).

[3] *E.g.*, Parker v. County of Los Angeles, 338 U.S. 327 (1949).

[4]*E.g.*, Massachusetts v. Mellon, 262 U.S. 327 (1949).

[5]*E.g.*, Singer Mfg. Co. v. Wright, 141 U.S. 696 (1891).

[6]*E.g.*, United States v. Johnson, 319 U.S. 302, 305 (1943).

[7]See Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240 (1937).

[8]*E.g.*, St. Pierre v. United States, 319 U.S. 41, 42 (1943).

[9]*E.g.*, South Spring Hill Gold Mining Co. v. Amador Medean Gold Mining Co., 145 U.S. 300, 301 (1892).

[10]Massachusetts v. Mellon, 262 U.S. 447, 488 (1923).

tutional question.[11] That dismissal was justified because his complaint contained allegations asserting infringements of his patients' rights rather than infringement of his own liberty or property rights. It is not unreasonable to conclude from that opinion that had the physician's complaint been more skillfully framed the case might have been entertained. It is of interest to mention that that defect was cured in the noted case.

Certainly no one can question either the wisdom or the necessity of the Supreme Court's policy of reluctance to decide constitutional questions in advance of the necessity for decision.[12] However, all will agree that this policy must be practiced with a maximum of care so as not to avoid truly justiciable issues. In the present case the majority dismissed the question by saying that the history of the statute demonstrates that enforcement is not probable. The majority further concluded that the controversy is deprived of the necessary immediacy because Connecticut has not chosen to press the enforcement of this statute. The fact still remains that these complainants are subject to prosecution if they violate the statute. It is the opinion of this writer that the majority's reasoning is not well founded, and further that the case presents a justiciable issue which should have been entertained.

Harry L. Case, Jr.

Constitutional Law—Sunday Laws—Upheld on Social Desirability

Seven employees of a large discount department store in Maryland were convicted under the Maryland Blue Laws which prohibited the sale of certain articles on Sunday.[1] They appealed on the grounds that the classifications within the statutes denied equal protection of the law, that the statutes were so vague as to fail to give reasonable notice of the forbidden conduct, thereby denying due process, and that the laws respected the establishment of religion, contravening the first amendment. Held: Affirmed. The statutes are consistent with both the due process and equal protection clauses of the fourteenth amendment and the establishment of religion clause of the first amendment. *McGowan v. Maryland*, 81 Sup. Ct. 1101 (1961).

The constitutional requirement of definiteness is not met by a statute which fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.[2] In the present case the Court held that the statute[3] involved was sufficiently clear to inform a person of normal intelligence of the exceptions encom-

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[11]Tileston v. Ullman, 318 U.S. 44 (1943).

[12]See Alabama State Fed'n. of Labor v. McAdory, 325 U.S. 450, 461 (1945).

[1]Md. Ann. Code art. 27, §§ 492-534; art. 2B, §§ 28(a), 90-106; art. 66C, §§ 132(d), 698(d) (1957).

[2]See United States v. Harriss, 347 U.S. 612 (1954).

[3]Md. Ann. Code art. 27, § 509 (1957).

passed by it, therefore, not violating the due process clause of the fourteenth amendment.[4]

In enacting laws to remedy local problems "the range of the state's discretion is large,"[5] and if any reasonably conceivable set of facts can be found to justify a statutory discrimination, such discrimination will not render the statute unconstitutional.[6] "The prohibition of the equal protection clause goes no further than the invidious discrimination";[7] in the instant case a reasonable basis for classification, which fulfilled the requirements of the fourteenth amendment, was found to exist.[8]

The third and most important problem presented in this case was whether a law prohibiting the sale of certain items on Sunday is in aid of or respecting the establishment of a religion, in that Sunday is the Sabbath for the predominant Christian sects. The English Sunday laws, from which our Sunday laws were derived, were undeniably religious in purpose.[9] Therefore, the pertinent question is whether these laws, which were religious in origin, are now serving social functions or religious functions. There are presently many civil regulations enforcing conduct which is harmonious with religious canons, including state prohibitions of murder, theft, and adultery.[10] The fact that these practices are repugnant to the social interest justifies the laws prohibiting them. Because these laws serve the secular interest, they sometimes offend and are opposed to certain religious beliefs, such as the practice of polygamy. However, this clash with certain religious views does not render such laws unconstitutional when the public interest as a whole is benefited by them.[11] The social aspect of Sunday legislation has long been recognized. In the eighteenth century Blackstone wrote, "The keeping one day in seven holy, as a time of relaxation and refreshment as well as for public worship, is of admirable service to a state considered merely as a civil institution."[12] The recognition of Sunday as a day of rest has prompted modern groups, concerned solely with secular interests, to seek enforcement of Sunday legislation.[13] Although many of the statutes now in use still call Sunday the *Sabbath*,[14] which has overtones of the religious influence in their enactment, they have been supported as civil regulations.[15] The view that Sunday legislation is justifiable as fulfilling social needs was well expressed by Mr. Justice Fields: "Laws setting aside Sunday as a day of rest are upheld, not from any right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted

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[4]McGowan v. Maryland, 81 Sup. Ct. 1101, 1106 (1961).

[5]Bain Peanut Co. v. Pinson, 282 U.S. 499, 501 (1930).

[6]See Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947).

[7]Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955).

[8]McGowan v. Maryland, 81 Sup. Ct. 1101, 1104-1106 (1961).

[9]See Rosenbaum v. State, 131 Ark. 251, 199 S.W. 388 (1917).

[10]*E.g.*, MISS. CODE ANN. §§ 1998, 2217, 2240 (1942).

[11]*E.g.*, Reynolds v. United States, 98 U.S 145 (1878)

[12]4 BLACKSTONE, COMMENTARIES *63.

[13]See 73 HARV. L. REV. 729 (1959).

[14]*E.g.*, MISS. CODE ANN. § 2370 (1942).

[15]*E.g.*, Paramount-Richards Theatres Inc. v. City of Hattiesburg, 210 Miss. 271, 49 So. 2d 574 (1950).

labor."[16] In other fields of conflict concerning the establishment of religion clause, the Court has not hesitated to uphold cases where the social benefit attained was paramount and the benefit to a religion was incidental.[17] The Court disposed of the appellants contention as to infringement of religious freedom on the grounds that the appellants did not allege their own religious beliefs. Consequently, they had no standing to raise this issue[18] because a litigant may only assert constitutional rights and immunities personal to him.[19] The appellants were found to have standing to raise the issue of separation of church and state;[20] nevertheless the Court upheld the contested statutes on the grounds of social desirability.[21]

Legislation currently in force in forty-nine of the fifty states makes illegal on Sunday some form of conduct lawful if performed on weekdays.[22] Most of these regulations are re-enactments and amendments of older statutes, and the fact that revisions and changes are being made constantly[23] is indicative of their popularity and utility. Also significant of their usefulness is the stand taken by the state appellate courts. Only one state appellate court has found Sunday laws unconstitutional[24] and that decision was overruled three years later.[25] Every other appellate court which has considered the question has found the statutes supportable as civil regulations.[26] The Mississippi Supreme Court has repeatedly sustained the validity of both local and state regulations of Sunday activities.[27] There is no doubt that in the future, as in the past, Sunday laws will stand as a valid exercise of the state's police power to protect the health, morals, and welfare of its citizens.

Carl S. Downing

Constitutional Law—The Integrated Bar

A Wisconsin lawyer appealed to the United States Supreme Court from a judgment upholding the constitutionality of a statute compelling membership in the bar of that state. He alleged that a part of the dues paid to the bar association was used in support of legislation to which he was opposed and that this compulsory financial support of political views violated his rights under the first and fourteenth amendments to the Federal Constitution. Held: Affirmed. The order integrating the

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[16]Soon Hing v. Crowley, 113 U.S. 703, 710 (1885).

[17]*E.g.*, Everson v. Board of Education, 330 U.S. 1 (1947).

[18]McGowan v. Maryland, 81 Sup. Ct. 1101, 1107 (1961).

[19]United States v. Raines, 362 U.S. 17 (1960).

[20]McGowan v. Maryland, 81 Sup. Ct. 1101, 1108 (1961).

[21]*Id.* at 1119.

[22]*Id.* at 1172, 1202-1215.

[23]See, *e.g.*, Miss. Code Ann. § 2368 (1956).

[24]*Ex Parte* Newman, 9 Cal. 502 (1858).

[25]*Ex Parte* Andrews, 18 Cal. 679 (1861).

[26]McGowan v. Maryland, 81 Sup. Ct. 1101, 1179 (1961).

[27]*E.g.*, Paramount-Richards Theatres Inc. v. City of Hattiesburg, 210 Miss. 271, 49 So. 2d 574 (1950).

Wisconsin bar did not infringe upon attorney's constitutionally protected freedom of association. *Lathrop v. Donahue*, 81 Sup. Ct. 1826 (1961).

Having decided a related question in an earlier decision,[1] the United States Supreme Court upheld by a 7-2 vote the constitutionality of the integrated bar against a claim of violation of petitioner's right to freedom of association. The question remains unsettled, however, whether the use of dues paid these organizations and used to support legislative objectives to which petitioner is opposed is violative of his right of freedom of speech. Four Justices—the Chief Justice and Justices Brennan, Clark, and Stewart—declined to rule on the freedom of speech issues, holding the question not properly before the court owing to what was apparently a curable defect in pleading. They voted to affirm the Wisconsin decision without allowing leave to amend.[2] The remaining five members considered the issue involving freedom of speech to be squarely before the Court. Justices Harlan and Frankfurter disposed of the claimed violation of a constitutional right by adopting the "balancing" test[3] which permits abridgement of first amendment rights so long as that abridgement furthers some legitimate purpose of the state.[4] Mr. Justice Whittaker held the statute constitutional under the theory that the practice of law is a "special privelege"[5] granted by the state. Mr. Justice Black voted to reverse on the ground that the legislation was a violation of petitioner's right of freedom of speech,[6] and the dissent of Mr. Justice Douglas declared the whole integrated bar concept a violation of the right of freedom of association save in exceptional circumstances[7] where legislation might be narrowly drawn[8] to remedy a particular situation.[9]

Twenty-six states,[10] among them Mississippi,[11] require the integrated bar, and every recorded case has upheld the constitutionality of these associations.[12] The decisions hold the basis for the integrated bar to be the essential service it renders as a governmental body.[13] It has been said that it is impossible to put on such a program without means to defray the expense.[14] Further, while every member is given an opportunity to do his part in performing the public service expected of him,

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[1]See Railway Employees' Dep't, AFL v. Hanson, 351 U.S. 225 (1956) (upheld a union-shop contract against objection that it violated freedom of association).

[2]*But see, e.g.*, Brown v. Western Ry. of Alabama, 338 U.S. 294 (1949).

[3]See, *e.g.*, American Communications Ass'n, CIO v. Douds, 339 U.S. 382 (1950).

[4]See, e.g., Barenblatt v. United States, 360 U.S. 109 (1959).

[5]Cohen v. Hurley, 366 U.S. 117 (1961).

[6]Cf. International Ass'n of Machinists v. Street, 81 Sup. Ct. 1784, 1805 (1961) (dissenting opinion of Mr. Justice Black).

[7]Cf. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[8]See Cantwell v. Connecticut, 310 U.S. 296 (1940).

[9]See, *e.g.*, Sheldon v. Tucker, 364 U.S. 479 (1960).

[10]International Ass'n of Machinists v. Street, 81 Sup. Ct. 1784, 1819 (1961) (concurring opinion of Mr. Justice Frankfurter).

[11]MISS. CODE ANN. §§ 8685-8724 (1956).

[12]*E.g.*, Carpenter v. State Bar of California, 211 Cal. 358, 295 Pac. 23 (1931).

[13]See State Bar of California v. Superior Court, 207 Cal. 323, 278 Pac. 342 (1929).

[14]Petition of Florida State Bar Ass'n, 40 So. 2d 902 (Fla. 1949).

he is also obliged to bear his portion of the responsibility.[15] The courts have said that the membership fee in the integrated bar association is an exaction for regulation only,[16] and that the dues payable by a lawyer are in the same category as an annual license fee imposed upon any occupation or profession which is subject to state regulation.[17] A federal decision holds that the fact that a license fee exacted by the courts is not deposited in the public treasury but is disbursed by the court-created agency to which paid, does not militate against the validity of such a license fee.[18]

The activities of the State Bar of Wisconsin in the judicial field have dealt with the administration of justice, court reform, and legal practice.[19] Unlike a voluntary association, which may take a stand on any proposed legislation in any field, the integrated bar must confine its activities in legislative matters to those authorized by the rules and bylaws formulated by the state supreme court.[20] The Wisconsin court felt that the public welfare would be promoted by securing and publicizing the composite judgment of the members of the bar on matters authorized under the bylaws of the association. The court held that "the general public and legislature are entitled to know how the profession as a whole stands on . . . proposed legislation."[21]

It seems evident that conflicts with personal beliefs are inevitable in the promotion of such an enterprise. The courts are necessarily required to balance the competing public and private interests which are at stake.[22] In all cases the governmental purpose must justify whatever infringements on personal rights may result.[23] Indeed, it is thought that any other approach could "render every governmental exaction the material of a free speech issue."[24] It may be argued that this case is of the sort which the Supreme Court has struck down as involving a compelled affirmation of belief,[25] a point which the Wisconsin court undoubtedly had in mind when they said that "everyone understands or should understand that the views expressed are those of the state bar as an entity separate and distinct from each individual."[26] In other cases where the power of a state to subordinate personal rights in order to further a governmental purpose has been brought in question, it has been argued without avail that the Constitution allows absolutely no infringement of first and fourteenth amendment rights, regard-

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[15]See, *e.g.*, *ibid.* Compare Railway Employees' Dep't, AFL v. Hanson, 351 U.S. 225 (1956).

[16]See, *e.g.*, Petition of Florida State Bar Ass'n, 40 So. 2d 902 (Fla. 1949). Compare United States v. Butler, 297 U.S. 1 (1935).

[17]Integration of the Bar Case, 244 Wis. 8, 11 N.W.2d 604 (1943).

[18]Laughlin v. Clephane, 77 F. Supp. 103 (D.D.C. 1947).

[19]Lathrop v. Donohue, 10 Wis.2d 230, 102 N.W.2d 404 (1960).

[20]*Ibid.*

[21]*Ibid.*

[22]See, *e.g.*, Barenblatt v. United States, 360 U.S. 109 (1959).

[23]See, *e.g.*, Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245 (1934).

[24]Lathrop v. Donohue, 81 Sup. Ct. 1826, 1843 (1961) (concurring opinion of Mr. Justice Harlan).

[25]West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

[26]*In re* Integration of the Bar, 5 Wis.2d 618, 93 N.W.2d 601 (1958).

less of the object.[27] This theory goes even beyond the "clear and present danger" test[28] for which Mr. Justice Douglas contended in the noted case.

On analysis, this decision is a triumph for the supporters of the integrated bar. It conclusively confirms the power of a state to organize such an association, to compel membership, and to require the payment of dues. It is unfortunate that the free speech question was not determined, especially when a majority of the court felt that it was properly presented. When and if the issue of free speech is entertained, it seems likely that the present decision will be upheld.

James T. Caldwell

Income Taxation—Nonrecognition of Gain on Sale of Old Residence—Deduction Limited

Action under the 1939 Code for refund of individual income taxes. The taxpayer entered into a contract for the construction of a new residence. The date of completion specified therein was approximately 17½ months after the date on which the taxpayer had sold her old residence. The contractor was unable to procure certain required materials and the completion date was delayed nearly one year. In computing the capital gain from the sale of the old residence, taxpayer deducted the total construction cost of the new residence. The Commissioner allowed as a deduction only the amount paid for work actually performed within the allowable 18 month period. In an action for refund the district court found for the Commissioner.[1] Held: Affirmed. Only that portion of the cost of the new residence attributable to work physically completed within the statutory period could be used as a deduction in determining recognized gain from the sale of the old residence. *Kern v. Granquist*, 291 F.2d 29 (9th Cir. 1961).

In 1951 Congress added certain provisions to the 1939 Code which were carried virtually intact into the 1954 Code, under which the homeowning taxpayer could replace his residence and postpone the recognition of gain.[2] The amended 1939 Code provides that gain from the sale of property used by the taxpayer as his principal residence will be recognized only to the extent that the selling price of the old residence exceeds the taxpayer's cost of purchasing a new residence, provided that the new residence is purchased and used by the taxpayer as his principal residence within a period beginning one year prior to and ending one year subsequent to the date of sale of the old residence.[3] Any part of a residence which is constructed by the tax-

[27]See, *e.g.*, Scales v. United States, 81 Sup. Ct. 1469 (1960) (dissenting opinion of Mr. Justice Black).

[28]*E.g.*, Schenck v. United States, 249 U.S. 47 (1919).

[1]Kern v. Granquist, 185 F. Supp. 769 (D. Ore. 1960).

[2]Int. Rev. Code of 1939, § 112(n), added by ch. 521, 65 Stat. 493 (1951), as amended (now Int. Rev. Code of 1954, § 1034).

[3]Int. Rev. Code of 1939, § 112(n)(1), added by ch. 521, 65 Stat. 493 (1951) (now Int. Rev. Code of 1954, § 1034(a)).

payer is considered as purchased.[4] The cost of purchasing the new residence includes only so much of the cost as is attributable to acquisition, construction, reconstruction, and improvements made within the specified period.[5] In the case of a new residence, the construction of which is commenced not later than one year following the date of sale of the old residence, the period within which construction costs are includable in the purchase cost is extended to 18 months following the date of sale of the old residence.[6]

In the principal case the taxpayer argued that the cost of construction of the new residence included the entire cost of construction of the new residence, since it was contractually incurred during the 18 month period. The Commissioner contended that only so much of the cost of the new residence was includable as could be attributed to construction physically completed and used within the 18 month period. The court felt that the word "made" in the statutory phrase "there shall be included only so much of his cost as is attributable to the . . . construction . . . made . . . during the period specified . . ."[7] was decisive of the case. By resort to the legislative history[8] of the statute and the applicable regulations,[9] the court determined that both Congress and the Treasury Department had intended the word to mean "had constructed and used," and therefore, decided in favor of the Commissioner. The dissent was of the opinion that Congress had intended to grant relief in circumstances such as those in the present case.[10] It emphasized the fact that the taxpayer, within the time permitted by the statute,[11] had incurred a liability for the entire cost of construction under a contract which, by its terms, was to have been completed within the 18 month period, and that it was through no fault of the taxpayer that the completion date was delayed. The dissent also took the position that the word "made," as used in the regulations,[12] was ambiguous, thereby implying that the regulations were of little value in interpreting the statute.[13] It further considered the legislative history[14] merely a restatement of the proposed statute[15] felt that it was just as consistent with a reversal of the case as with an affirmance.

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[4]Int. Rev. Code of 1939, § 112 (n) (2) (d), added by ch. 521, 65 Stat. 493 (1951) (now INT. REV. CODE OF 1954, § 1034 (c) (2)).

[5]*Ibid.*

[6]Int. Rev. Code of 1939, §112 (n) (2) (6), added by ch. 521, 65 Stat. 493 (1951) (now INT. REV. CODE OF 1954, § 1034 (c) (5)).

[7]Int. Rev. Code of 1939, § 112 (n) (2) (d), added by ch. 521, 65 Stat. 493 (1951) (now INT. REV. CODE OF 1954, § 1034 (c) (2)).

[8]*E.g.*, H.R. REP. No. 1213, 82nd Cong., 1st Sess. 76 (1951), 1951-2 CUM BULL. 622, 629.

[9]Treas. Reg. 118, § 39.112 (n) -1 (b) (5) (1953).

[10]Kern v. Granquist, 291 F.2d 29, 33 (9th Cir. 1961).

[11]Int. Rev. Code of 1939, § 112 (n) (2) (g), added by ch. 521, 65 Stat. 493 (1951) (now INT. REV. CODE OF 1954, § 1034 (c) (5)).

[12]Treas. Reg. 118, § 39.112 (n) -1 (b) (5) (1953).

[13]Int. Rev. Code of 1939, § 112 (n) (2) (d), added by ch. 521, 65 Stat. 493 (1951) (now INT. REV. CODE OF 1954, § 1034 (c) (2)).

[14]*E.g.*, H.R. REP. No. 1213, 82d Cong., 1st Sess. 76 (1951), 1951-2 CUM. BULL. 622, 629.

[15]Int. Rev. Code of 1939, § 112 (n) (2) (d), added by ch. 521, 65 Stat. 493 (1951) (now INT. REV. CODE OF 1954, § 1034 (c) (2)).

The principal case appears to have presented for the first time litigation involving its particular factual situation. Due to the similarity between the pertinent 1939 and 1954 Code sections, as well as the regulations thereunder, it is probable that substantially the same result would have been reached under the latter. The legislative history[16] of the 1951 amendment indicates that Congress recognized that unfavorable tax consequences were being experienced by the homeowning taxpayers upon selling a residence and replacing it with another. Further consideration was given therein to the fact that instances of this nature increase among taxpayers when there is an increase in change of employment, especially in time of national mobilization.[17] Although the legislative history relates the matter of the hardships placed upon the taxpayer primarily to the sale and actual purchase of his residence, it is submitted that the purpose therein embraces the relief sought in the principal case. Three points are offered in support of this position: (1) Congressional desire to postpone the recognition of gain apparently was strong inasmuch as the amendment was incorporated in a revenue act[18] designed to meet the demands of the Korean War. (2) As the dissent points out, the amendment was passed because it was universally known that inflation had substantially[19] increased the cost and selling price of residences. (3) Congress was aware that with mobilization being a prime factor in increasing the extensiveness of the hardship, it was not inconceivable that such a condition would produce shortages in materials from time to time which could result in prolonging the date of completion in numerous residential construction contracts. The court observed that the statute produced inequities but felt that a reversal of the case would amount to "judicial legislation." The decision seems to coincide with the general position taken by the Treasury Department under both the 1939[20] and 1954[21] Codes; however, it is submitted that the decision is in opposition to the legislative intent in that it reestablishes a portion of the tax burden that Congress had sough to reduce. It is suggested that Congress should reappraise the statute and clarify its intent through an amendment which would expressly extend relief to homeowners who fail to realize the full benefit of the existing statute due to circumstances beyond their control.

Justin L. Cox

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[16]*E.g.*, H.R. REP. No. 586, 82d Cong., 1st Sess. (1951), 1951-2 CUM. BULL. 357, 377.

[17]*Ibid.*

[18]Revenue Act of 1951, ch. 521, 65 Stat. 452 (1951).

[19]Kern v. Granquist, 291 F.2d 29, 33 (9th Cir. 1961).

[20]Rev. Rul. 55-90, 1955-1 CUM. BULL. 348 (1955).

[21]Rev. Rul. 57-234, 1957-1 CUM. BULL. 263 (1957).

RECENT BOOKS

BRIEFING AND ARGUING FEDERAL APPEALS

By Frederick Bernays Wiener, Washington: The Bureau of National Affairs, Inc., 1961. Pp. 522. $11.75.

This is the second edition of a remarkably well-received book on appellate briefing and oral advocacy. The earlier edition was published in 1950 under the title *Effective Appellate Advocacy*. One who is, by reason of being a member of an appellate court, made the target by the practitioner of the art of such advocacy must inevitably, on reading the book, be somewhat surprised to learn that so much pain need be taken by lawyers to cause appellate judges to seek and find the truth and right of a case on appeal. This thought arises because certainly most appellate judges not only have a keen interest in doing just this, but they are also under the heavy pressure of a consciousness of their duty to find the truth and to do justice.

Undoubtedly, however, the well-developed and well-written discussion in this book of those things which the lawyer can do to aid the court in its search should be of immense value to any lawyer who plans to write a brief or argue a case before an appellate court.

Mr. Wiener's book really takes the lawyer by the hand before he starts writing his brief and shows him such detailed matters as how to word the question on appeal, how to word the headings and subheadings, and, after the brief is written, how and when to prepare the summary of argument. It then contains valuable advice on the preparation of the statement of facts and the arrangement of argument.

It may be assumed that any appellate judge would most heartily agree with the author's insistence on the need for keeping the statement of facts completely accurate, free of argument, and with ample documentation by record references. He is right in his assurance to the advocate that nothing more quickly generates in the minds of the judges complete confidence in the lawyer's advocacy than an accurate, well-documented statement of facts—facts that hurt as well as facts that help his cause.

Of almost equal importance in winning the confidence of the court is a fair statement of the question or questions on appeal. It does little good to a lawyer's case for him to try to get his argument, much less his emotional reactions, in his formulation of the questions to be decided.

The author very properly says that within the bounds of fairness and truth and ruled by the proprieties that inhere in a proceeding in a court of law, the appellate court advocate owes it to his client and to the court as well to present his facts and law most appealingly. Much, of course, can be learned by observation of others of how this can be done. This book should help the lawyer who wishes to learn without going through the painful process of trial and error himself.

Mr. Wiener, by reason of association with the office of the Solicitor General of the United States and through private practice, has had eminent experience in the Supreme Court. Undoubtedly, the presentation of a case adequately before that Court, both in the briefing and in oral argument, calls for qualities that are so significantly different

from those ordinarily engaged in by other courtroom lawyers as to amount almost to a specialty. However, as to the great bulk of federal appellate practice it seems to this writer that the book may overemphasize the need for special appellate counsel. This need is stated:

> "Moreover, quite apart from the differences in technique that stem basically from the character of the respective tribunals, quite apart also from the comparative emphases on specialization versus generalization, the most vital and significant point is that experience teaches it is better, regardless of the talents of the individual concerned, to entrust the appeal to a lawyer other than the one who tried the case." (Page 382).

It is not a captious criticism to point to a somewhat conflicting statement on the first page of the book:

> "Many of the principles defined and discussed herein are applicable also to the argument, oral and written, of questions of fact and law presented and heard in Federal trial courts. The task of presenting facts and law effectively, the psychology of persuasion, the requirements of candor and accuracy—these are matters common to forensic effort in every courtroom, at every stage of a litigated proceeding."

It is believed that much of the merit of *Briefing and Arguing Federal Appeals* is that the latter statement is true and any lawyer worthy of the name may profit from the teachings of the book and should greatly enhance his abilities as an appellate advocate whether or not he follows the case all the way through the trial and appellate courts.

The writer of this review has earned an added dividend from the reading of the book, in that much that is said by the author touching on preparation and organization of briefs should be equally helpful to appellate judges in the construction of their opinions.

Elbert P. Tuttle, Chief Judge
United States Court of Appeals
Fifth Judicial Circuit

THE NEW WAGE AND HOUR LAW
Operations Manual

By the editorial staff of *The Labor Relations Reporter,* directed by Howard J. Anderson, Managing Editor, The Bureau of National Affairs, Inc. Washington: The Bureau of National Affairs, Inc., 1961. Pp. 366. $9.50.

Labor Day of 1961 took on more than its traditional significance, because it ushered in a new set of improvements for American workers under the recently amended terms of the Fair Labor Standards Act. On May 3, 1961, Congress approved the Fair Labor Standards Act's amendments of 1961. Two days later President Kennedy affixed his signature to the measure, and Labor Day eve of 1961 became the date for the rise in the minimum wage for some 24 million employees to $1.15 an hour. A further increase to $1.25 is scheduled for 1963.

This development is the product of a massive political effort by trade unions. On September 3, more than 2,500,000 workers in America had their pay raised under a schedule which will eventually bring the federal floor under wages to $1.25 per hour. Approximately 3.6 million workers who had theretofore not had the protection of the law were covered for the first time under the amendment. The minimum rate for these workers will be $1 per hour, and they will be raised to $1.25 per hour by stages over a four year period. The largest segment of this group are some 2.3 million men and women employed in retail and service industries. It is estimated that approximately 663,000 of these newly covered workers are now earning less than $1 per hour. Among those who stand to receive an immediate increase are nearly 2,000,000 workers who have been under the protection of the law but who are now earning less than $1.15 per hour.

Government statisticians estimate that at least $2 million in purchasing power will be pumped into the national economy during the first year of the new standard. The above mentioned workers who will now be covered for the first time have also been working without a time-and-a-half guarantee for overtime work. They will continue to be without this protection for the next two years. However, after the end of the second year, they will start receiving time-and-a-half after 44 hours per week; in the fourth year, this premium pay will be made mandatory after 42 hours a week, and in the fifth year they will be on a par with all other workers who are guaranteed overtime rates after 40 hours per week.

Another of the groups which are covered by the laws are made up of about 33,000 workers employed in seafood processing plants. Another group which will enjoy the protection of the law for the first time consists of approximately 30,000 telephone operators employed by independent telephone companies in very small exchanges. The list also includes some 86,000 gasoline service station attendants, and 93,000 workers employed by transit companies. In the cases of these workers only the minimum wage provisions will apply. They will not be covered by the overtime provisions. Approximately a million employees of construction companies, which do at least $350,000 worth of business apiece each year will come under the law for the first time.

The 1961 amendments also brought into coverage for the first

time approximately 100,000 seamen who work on ships sailing under the American flag.

This, generally, is the substance of the wage and hour gain labor made in the spring of 1961. The enactment of the amendment, however, was not greeted with unmixed cheers because of some of labor's major aims in the 1961 Congress were not achieved.

The original Fair Labor Standards Act was passed by Congress in 1938. The minimum wage at that time was placed at 40 cents per hour. In 1949, Congress undertook the first general overhauling of the Act. The minimum wage was raised to 75 cents an hour, and the coverage of the Act was narrowed. Pressure for restoring this lost coverage began immediately within organized labor.

The minimum wage was increased again in 1955 to $1 an hour, effective March 1, 1956. However, the 1961 amendments marked the first time that the coverage of the Act had been expanded since it was first adopted. New coverage tests of the enterprise engaged in commerce or the production of goods for commerce provides a formula for the extension of coverage merely by reducing the dollar volume test.

The large body of decisions construing the original law and the early amendment will, in all probability, afford some help in the determination of the intent and meaning of the new amendment; however, the exact impact of the changes will not appear until much of the new language has been interpreted by the court. The purpose of the manual is to provide the basis for an initial understanding of the law as it is now amended. An attempt is made to analyze the revised provisions in the light of the original law decisions construing it and early amendments, together with the legislative history of the new amendment. The appendices in the manual contain the text of the law as amended, the documents that comprise the legislative history of the 1961 amendments, and excerpts from the Congressional debate on amendments.

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BOOKS RECEIVED

A TREASURY OF LEGAL QUOTATIONS. Edited by Paul C. Cook. New York: Vantage Press, Inc., 1961. Pp. 181. $5.00.

CRIME IN AMERICA. Edited by Herbert A. Bloch. New York: Philosophical Library, Inc., 1961.

EXPULSION OR OPPRESSION OF BUSINESS ASSOCIATES. F. Hodge O'Neal and Jordan Derwin, Project Directors. Durham, N. C.: Duke University Press, 1961. Pp. 263. $10.00.

FREEDOM AND THE LAW. Bruno Leoni. Princeton, N. J.: D. Van Nostrand Company, Inc., 1961. Pp. 196. $6.00.

JUSTICE HOLMES, NATURAL LAW, AND THE SUPREME COURT. Francis Biddle. New York: The Macmillan Company, 1961. Pp. 77. $2.50.

SOCIOLOGY OF CRIME. Edited by Joseph S. Roucek. New York: Philosophical Library, Inc., 1961.

THE MENTALLY DISABLED AND THE LAW. Edited by Frank T. Lindman and Donald M. McIntyre, Jr. Chicago: The University of Chicago Press, 1961. Pp. 431. $7.50.

THE PLANNING AND ADMINISTRATION OF ESTATES. Edited by Rene Wormser. New York: Practising Law Institute, 1961. Pp. 324. $7.50.

THE SUPREME COURT OF THE UNITED STATES. Paul A. Freund. New York: World Publishing Company, 1961. Pp. 191. $1.35.

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